RECORD, CASE No. 14,743.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 549. 229

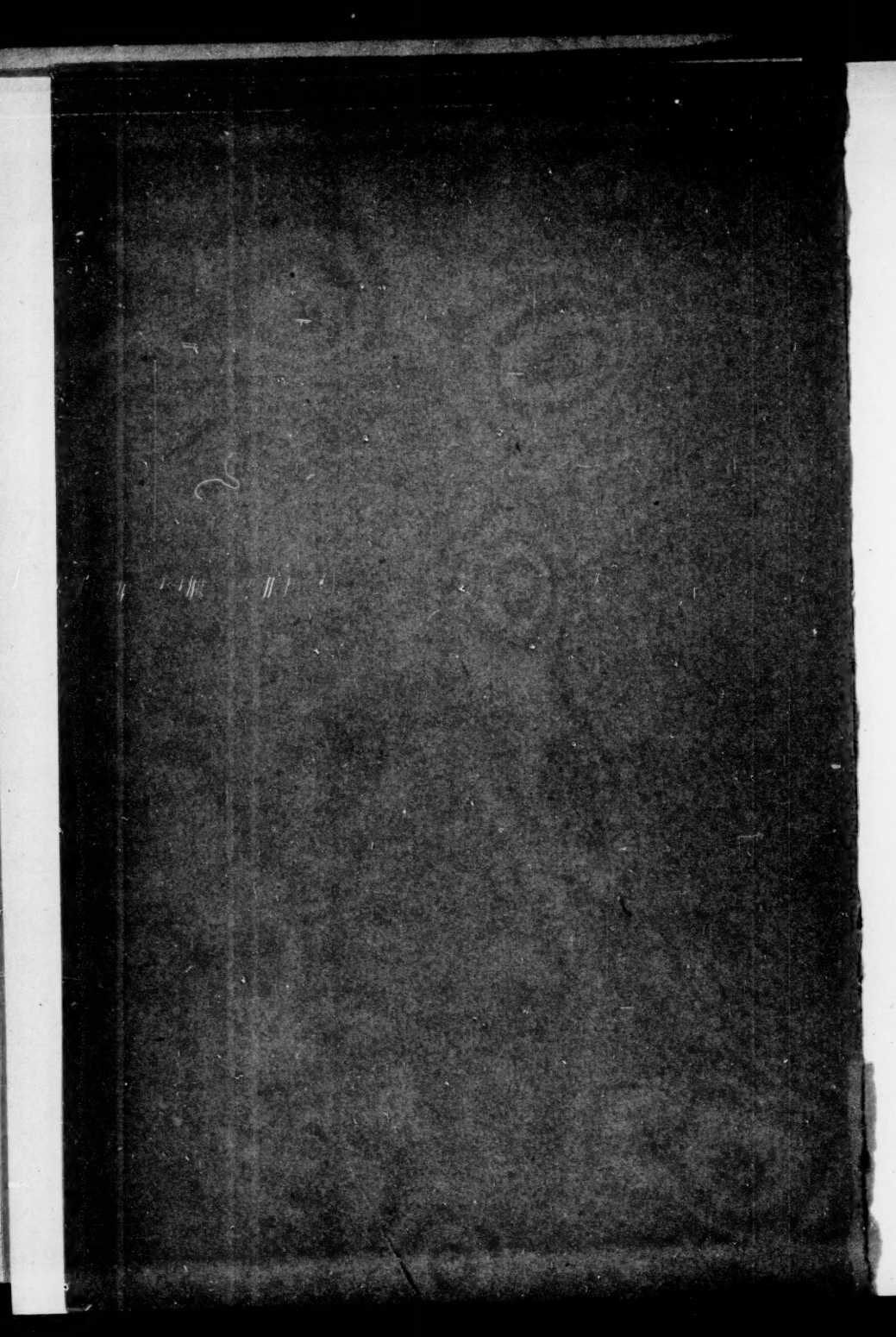
DWIGHT CUTLER, PLAINTIFF IN ERROR,

vs.

ANNA B. HUSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED JULY 15, 1891.



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INDEX.

	Original.	Print.
Declaration	1	1
Plea	2	2
Judgment against defendant	3	3
Taxed bill of costs	4	3
Affidavit for writ of garnishment	5	5
Writ of garnishment	7	6
Disclosure of garnishee	8	7
Stipulation waiving jury	10	9
Order taking cause under advisement	11	9
Findings of fact	12	9
Conclusions of law	15	11
Judgment against garnishee	16	12
Garnishee's request to amend findings	17	12
Garnishee's exceptions to findings of fact and conclusions of law	19	13
Petition for writ of error	21	14
Assignment of errors	22	15
Bond on writ of error	26	17
Copy of writ of error	28	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 23, 1893.

	Original.	Print.
Bill of exceptions	29	19
Testimony of Theodore Huston	29	19
James H. Grigsby	43	28
John Huston	45	29
Wm. D. Place	48	31
Dwight Cutler	49	31
Deeds and mortgages offered	55	34
Garnishee's request to amend findings	57	35
Judge's certificate to bill of exceptions	59	36
Exhibit No. 1—Will of Rigdon Huston	60	36
Admission of service of citation	67	40
Citation	68	40
Admission of service of writ of error	69	40
Writ of error	70	41
Clerk's certificate	72	41

1 *Declaration.*

UNITED STATES OF AMERICA, *Western District of Michigan,* } ss:

The Circuit Court of the United States for the Western District of Michigan, of the —— Term, A. D. 18—.

Anna B. Huston, who is — citizen of the State of Illinois, by McGarry & Ford, attorney-, filing this — declaration as commencement of suit, complain- of William Steele, who — citizen of the State of ——, of a plea of trespass on the case upon promises.

And that whereas the said defendant, on the 25th day of November, A. D. 1889, at the 2nd National Bank of Ionia, Mich., to wit, the banking-house of Webber Bros., in the city of Ionia, Ionia county, Michigan, in said district, was indebted to the plaintiff in the sum of fifteen thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request;

And in a like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at his request;

And in a like sum for money then and there lent by the plaintiff to the defendant at his request;

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at his request;

And in a like sum for money then and there received by the defendant for the use of the plaintiff;

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them;

And thereupon the said defendant afterwards and on the day and year and at the place aforesaid, in consideration of the premises respectively, then and there promised the said plaintiff to pay her the said several last-mentioned moneys respectively on request; yet he hath disregarded his promises and hath not paid any of the said moneys or any part thereof, although often requested so to do, to the plaintiff's damage of fifteen thousand dollars, and therefore she brings suit, etc.

McGARRY & FORD,
Plaintiff's Attorney-.

[Endorsed:] No. 2357. United States circuit court, western district of Michigan, southern division. Anna B. Huston, pl'tif-, *vs.* William Steele. *Narr.* To the within-named defendant: Take notice that on filing a declaration in this cause (of which the within is a true copy), as commencement of this suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office, in the city of Grand Rapids, requiring you to plead to said declaration within twenty days after the service upon you of a copy

thereof and notice of said rule or judgment, etc. Yours, etc., McGarry & Ford, attorney- for pl't'ff. Filed Dec. 14, 1889. C. L. Fitch, clerk.

To the above-named defendant:

Take notice that on the trial of the above cause the plaintiff, under the money counts, will give in evidence a certain promissory note, copy of which is given below and which constitutes the sole bill of particulars of plaintiff'- demand in the above-entitled cause.

McGARRY & FORD,
Plaintiff'- Attorney-.

Copy.

$9,600. BLANDINSVILLE, ILL., *Nov.* 22, 1888.

On or before one year after date we promise to pay to the order of executors of Rigdon Huston's estate, at the 2nd National Bank of Ionia, Mich., the sum of nine thousand six hundred dollars, at the rate of 6 per cent. per annum, eight per cent. per annum from maturity, value received.

WM. STEELE.

Upon the back of which is endorsed the following:

For value received we assign the within to Anna B. Huston this 17th day of August, 1889.

JOHN HUSTON,
THEODORE HUSTON,
CHAS. R. HUSTON,
Executors of Rigdon Huston's Estate.

2 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
WILLIAM STEELE, Defendant.

Now comes the said defendant, by Davis & Nichols, his attorneys, and demands a trial of the matters set forth in the plaintiff's declaration.

DAVIS & NICHOLS.
Attorneys for Defendant.

[Endorsed:] No. 2357. United States of America. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, plaintiff, *vs.* William Steele, defendant. Plea. Filed Jan. 27, 1890. C. L. Fitch, clerk. Davis & Nichols, att'ys for def't.

3 March Term, A. D. 1890.

SATURDAY, *March* 15, 1890.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

ANNA B. HUSTON
vs.
WILLIAM STEELE. } No. 2357.

This cause having been duly noticed for trial and inquest under common-law rule No. 34 of this court at the present term, and the same having been called for trial, the following jury was called and sworn, to wit: Freeman Addis, John Scott, Richard B. Newnham, Godfrey E. Knight, Charles Johnson, John Maxfield, A. P. Loomis, Martin Walch, Jesse Jordan, Isaac H. Sanford, Thomas Brown, and Charles C. Curtenius, who sat together in the jury seats, and, after listening to the evidence and the charge of the court, without leaving their seats, say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiff hath in her declaration alleged, and the said jurors assess the damages of the said plaintiff at the sum of ten thousand four hundred and ten dollars ($10,410.00) over and above her costs and charges by her about her suit in this behalf expended.

It is therefore considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed as aforesaid, together with her said costs and charges, to be taxed, and that the said plaintiff have execution thereof.

4 *Taxed Bill of Costs.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
WILLIAM STEELE, Defendant. } Plaintiff's Bill of Costs.

Attorney'- fee by statute	$20 00
Marshal's fees	5 25
Clerk's fees	6 30
Affidavit to fee bill	25
Total	$31 80

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, } *ss:*

I hereby tax the foregoing bill of costs at the sum of thirty-one & $\frac{80}{100}$ dollars.
Dated Apr. 21, 1890.

CHARLES L. FITCH, *Clerk.*

[Endorsed:] No. 2357. Circuit court of the United States for the sixth circuit and western district of Michigan, southern division. Anna B. Huston *vs.* William Steele. Taxed bill of costs. Plaintiff's costs taxed at $31.80. Filed Apr. 21, A. D. 1890. Charles L. Fitch, clerk. McGarry & Ford, attorneys for plaintiff.

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, } ss:

T. F. McGarry, being duly sworn, says that the foregoing items of costs charged as disbursements have actually been paid or the liability therefor incurred and were necessary and are reasonable in amount; that the witnesses above named were in good faith made to attend and were deemed material and necessary, and they respectively traveled the number of miles and actually attended the number of days specified, and that the copies and exemplifications charged for were actually and necessarily used or necessarily and in good faith obtained for use.

T. F. McGARRY.

Sworn to and subscribed before me this 14 day of April, A. D. 1890.

ALBERT K. ROOF,
Notary Public, Ionia Co., M.

To Davis & Nichols, attorneys for def't:

Take notice that the foregoing is a copy of the plaintiff's bill of costs proposed to be taxed and of the affidavits to be read in support thereof, and that application will be made to the clerk of the said court to tax the same, at his office, on the 21st day of April, A. D. 1890, at 10 o'clock a. m.

Dated this 14 day of April, A. D. 1890.

McGARRY & FORD,
Attorneys for the Plaintiff.

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, } ss:

T. F. McGarry, being duly sworn, says that on the 14 day of April, A. D. 1890, at 10 o'clock a. m., he served a copy of the above bill of costs, affidavit, and notice of application for taxation upon Davis & Nichols, attorneys for the defendant, by depositing the same in the U. S. post office, at Grand Rapids, Mich., enclosed in an envelope, with U. S. stamp, addressed to Davis & Nichols, Ionia, Mich.

T. F. McGARRY.

Sworn to and subscribed before me this 14 day of April, A. D. 1890.

ALBERT K. ROOF,
Notary Public, Ionia Co., Mich.

5 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
WILLIAM STEELE, Defendant.

UNITED STATES OF AMERICA,
Western District of Michigan, } ss:

Thomas F. McGarry, being duly sworn, deposes and says that he is one of the attorneys and the agent of the above-named plaintiff; that he makes this affidavit for and in her behalf; that he is authorized to do so; that the above-named plaintiff is a citizen of the State of Illinois; that heretofore, to wit, on the fifteenth day of March, A. D. 1890, in this court and cause, the said plaintiff, Anna B. Huston, obtained and recovered judgment against the said defendant, William Steele, who at that time was a citizen of the State of Michigan, upon an express contract, in the sum of ten thousand four hundred and ten dollars ($10,410) and costs of suit, which were subsequently taxed in favor of the plaintiff and against the defendant, to wit, April twenty-first, A. D. 1890, at the sum of thirty-one dollars and eighty cents ($31.80), which said judgment has never been appealed from, reversed, annulled, or set aside and now remains in full force and virtue; that there now remains due and unpaid upon the said judgment, over and above all legal set-offs, the sum of ten thousand four hundred and forty-one dollars and eighty cents ($10,441.80) and interest thereon at six per cent. since March fifteenth, A. D. 1890, and which said sum and the interest thereon said Anna B. Huston is entitled to recover from said defendant, William Steele.

And this deponent further says that he is justly apprehen-
6 sive of the loss of the said sum so recovered by the said plaintiff against said defendant and so due to the said Anna B. Huston from the said William Steele, as aforesaid, unless a writ of garnishment issue to Dwight Cutler, who is a citizen of the State of Michigan and resides in the sixth circuit and western district of Michigan and in the southern division thereof.

And this deponent further says that he has good reason to believe and does believe that the said Dwight Cutler has property, money, goods, chattels, credits, and effects in his hands and under his custody and control belonging to the said William Steele, and also that the said Dwight Cutler has property, goods, money, chattels, credits, and effects in his hands and under his control which he, the said Dwight Cutler, holds by a conveyance and title that is void as to the creditors of the said defendant, William Steele.

And further this deponent says not.

THOMAS F. McGARRY.

Subscribed and sworn to this 5th day of August, A. D. 1890, before me—

CHARLES L. FITCH,
Clerk U. S. Circuit Court, West. Dist. Mich.

I hereby agree to become surety for all costs for which the plaintiff may become liable for in the within-entitled cause.
Dated August 5th, 1890.

T. F. McGARRY.

[Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, complainant, *vs.* William Steele, defendant. Affidavit for writ of garnishment. Filed August 5, A. D. 1890. C. L. Fitch, clerk. McGarry & Ford, plaintiff's attorneys.

7 *Writ of Garnishment.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

The President of the United States of America to the marshal of the western district of Michigan, Greeting:

Whereas Anna B. Huston, who is a citizen of the State of Illinois, as plaintiff, has recovered a judgment in a personal action arising upon express contract in the circuit court of the United States for the sixth circuit and western district of Michigan, southern division, against William Steele, who is a citizen of the State of Michigan and a resident of the southern division of the western district thereof, as defendant, and has filed in the office of the clerk of said court the affidavit of Thomas F. McGarry, agent and attorney of and for said plaintiff, stating in said affidavit, amongst other things, that he, said affiant, has good reason to believe and does believe that Dwight Cutter, who is a citizen of the State of Michigan and a resident of the southern division of the western district thereof, had property, money, goods, chattels, credits, and effects in his hands and under his custody and control belonging to the said principal defendant, William Steele;

That the said defendant, William Steele, is justly indebted to the said plaintiff on such judgment in the sum of ten thousand four hundred forty-one & $\frac{80}{100}$ dollars over and above all legal set-offs, and that the said affiant is justly apprehensive of the loss to the plaintiff of the said sum unless a writ of garnishment issue to the aforesaid Dwight Cutler:

Now, therefore, you are hereby commanded to warn and summon the said Dwight Cutler to be and appear before said court, at the court-house, in the city of Grand Rapids, in said district, on Tuesday, the second day of September, in the year of our Lord 1890, to make disclosure in writing, under oath, to be filed with the clerk of

'said court, touching the liability of said Dwight Cutler as garnishee of the said William Steele, principal defendant, as charged in the said affidavit, and thenceforth to pay no money and deliver no property or effects to the said William Steele, the principal defendant in said action, until discharged.

And of this writ make due return to the said circuit court on said second day of September, 1890.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at the city of Grand Rapids, this 5th day of August, [SEAL.] in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fifteenth.

CHARLES L. FITCH, *Clerk*,
By —— ——, *Deputy*.

McGARRY & FORD,
Plaintiff's Attorneys.

[Endorsed:] No. 2357. The circuit court of the United States for the sixth circuit and western district of Michigan, southern division. Anna B. Huston *vs.* Dwight Cutler, garnishee of William Steele. Garnishment. Returnable the second day of September, A. D. 1890. Filed August 8, A. D. 1890. C. L. Fitch, clerk. McGarry & Ford, plaintiff's attorneys.

WESTERN DISTRICT OF MICHIGAN, *Southern Division*, } *ss*:

I hereby certify and return that on the 7th day of August, A. D. 1890, at Grand Haven, in said district, I served the within writ upon Dwight Cutler, the garnishee therein named, by showing the same to him and at the same time delivering to him a true copy of said writ.

JAMES R. CLARK,
U. S. Marshal,
By S. O. DISHMAN, *Deputy*.

Fees, 5.02.

8 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Southern Division.

ANNA B. HUSTON
vs.
WILLIAM STEELE, Principal Defendant, and DWIGHT CUTLER, Garnishee.

Dwight Cutler, the garnishee named in the writ of garnishment issued in this cause, for answer thereto and to the matters set forth in the affidavit in which the said writ was issued makes disclosure in writing touching the matters set forth in the said affidavit and writ of garnishment and in relation thereto says—

That at the time of the service of the said writ upon him, the said Dwight Cutler, he, the said Dwight Cutler, had — in his hands or under his control any property, moneys, effects, goods, chattels, or credits whatsoever belonging to the said William Steele except as follows:

That on the 13th day of July, 1890, the said William Steele gave a chattel mortgage to the garnishee, Dwight Cutler, to secure the repayment of $40,000 upon 160 head of short-horn Devon and Jersey cattle, fourteen work horses, about fifty sheep, a number of hogs, two stallions, and a quantity of farming utensils and some logs; that the amount secured to said garnishee by said mortgage is now due to him from said William Steele and unpaid; that said mortgage has been foreclosed in the circuit court for the county of Ionia, in chancery, and a decree rendered therein in favor of the garnishee, as complainant, and against the said William Steele, finding
9 the amount due thereon at over $40,000, and directing a sale of said property under said decree; that the garnishee, Dwight Cutler, now holds said property so authorized to be sold by said decree and is about to sell the same under and by virtue of said mortgage to satisfy said indebtedness.

Said garnishee further says that he holds no property of the said William Steele other than that so mortgaged; that he has held at no time from the said William Steele conveyances in fraud of creditors; that the security given by the said William Steele was for actual and *bona fide* indebtedness.

DWIGHT CUTLER.

STATE OF MICHIGAN,
County of Ottawa, Western District of Michigan, } *ss:*
Southern Division,

On this 16th day of August, 1890, before me personally came Dwight Cutler, the garnishee in the foregoing disclosure named, and made oath that he has read the foregoing disclosure by him made and subscribed and knows the contents thereof, and that the same is true in substance and fact.

WALTER G. VAN SLYCK,
[NOTARIAL SEAL.] *Notary Public.*

[Endorsed:] 2357. United States of America. Circuit court of the United States for the sixth circuit and western district of Michigan, southern division. Anna B. Huston, plaintiff, *vs.* William Steele, principal defendant, and Dwight Cutler, garnishee. Disclosure of Dwight Cutler, garnishee. Filed Aug. 19, 1890. C. L. Fitch, clerk.

10 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant.

It is hereby stipulated that a jury in this case is hereby expressly waived, and that said cause may be tried before the court without a jury.

McGARRY & FORD,
Attorneys for Plaintiff.
GEO. A. FARR,
Attorney for Garnishee Defendant.

[Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, plaintiff, *vs.* Dwight Cutler, garnishee defendant of William Steele, principal defendant. Stipulation to waive jury. Filed Mar. 3, 1891. C. L. Fitch, clerk. McGarry & Ford, attorneys for plaintiff.

11 March Term, A. D. 1891.

THURSDAY, *May* 7, 1891.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severens, district judge.

ANNA B. HUSTON
vs.
DWIGHT CUTLER, Garnishee of WILLIAM STEELE, Principal Defendant. } No. 2357.

This cause came regularly on for trial before the court without a jury, and thereupon the court heard the proofs and allegations of the parties and the arguments of counsel and took the said cause under advisement.

12 The Circuit Court of the United States for the Western District of Michigan, Southern Division.

ANNA B. HUSTON
vs.
DWIGHT CUTLER, Garnishee.

A jury having been waived, this cause was tried by the court upon the facts as well as law. The evidence on both sides having been adduced, counsel were heard in argument thereon.

Having fully considered the evidence in the case, I find the facts to be as follows:

First. On the 22d day of November, 1888, the principal defendant, William Steele, executed and delivered to the executors of Rigdon Huston's estate, for a valuable and sufficient consideration, his promissory note for the sum of $9,600, payable in one year from that date, with interest at six per cent.

Second. The said Rigdon Huston died on or about the 7th day of May, 1887, leaving several legatees, of whom Theodore Huston, the husband of the plaintiff, was one. The said Theodore Huston was one of the executors of the will of Rigdon Huston also, there being two others, namely, John Huston and Charlie R. Huston. The decedent and all the persons named in this paragraph resided in the State of Illinois.

Third. The plaintiff's husband, contemplating going into business which required capital, was desirous of obtaining from the said estate some portion — the share coming to him as aforesaid, and, upon his application to the other executors of said will, it was agreed between all three that the said Steele note should be turned over to him upon his giving back his note, signed also by the plaintiff, for the sum of $5,000, payable to the executors of said will in one or two years from its date.

13 Theodore Huston wished and intended to use this Steele note as collateral for the purpose of raising money for the use of his business above mentioned. On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have this Steele note endorsed to her. The agreement in its several parts, as stated in this paragraph, was executed and consummated on the 17th day of August, 1889, by the endorsement to the plaintiff of the said note of Steele by the three executors aforesaid and the delivery to them of the note of Theodore Huston and the plaintiff for the sum of $5,000 aforesaid. This last amount being the excess of the Steele note over the advancement on Theodore Huston's share in said estate then intended to be made, the note of Theodore and his wife was given and received to represent and stand in lieu of the portion of said note not intended to be then advanced.

Fourth. There was no actual fraud on the part of any of the parties to the transactions mentioned in paragraph three.

Fifth. The plaintiff brought suit on said Steele note in this court on the 14th day of December, 1889, and recovered judgment against the maker on the 15th day of March, 1890, for the sum of $10,410, damages, and costs, taxed at $31.80.

Sixth. On the 12th day of July, 1889, the garnishee defendant, Dwight Cutler, was a creditor of William Steele in a considerable sum, and had also endorsed Steele's notes for a considerable amount, and it was contemplated that possibly Cutler might make other advances to Steele. Steele was possessed of a large and valuable property, but was deeply in debt. On the day last mentioned he executed a number of conveyances and mortgages covering the

14 substance of his property to various parties; among the rest a real-estate mortgage for $25,000 to Mr. Cutler to secure the repayment of that sum that day loaned by Cutler to Steele.

Seventh. On the aforesaid 12th day of July, 1889, the said Steele executed and delivered a chattel mortgage covering a large amount of personal property to the said Cutler, the condition of said mortgage being as follows: That "Steele shall pay or cause to be paid the said D. Cutler all notes held by him, together with all notes of said Steele's upon which said Cutler is endorser; also any notes of said Steele held by the First National Bank of Grand Haven and any and all renewals thereof, together with any endorsements, loans, or advances hereafter made by said Cutler to said Steele or liabilities incurred in his behalf at the maturity of notes or the renewals thereof, then this instrument shall be void and of no effect."

The possession of the property mortgaged was not changed, but remained with the mortgagor. This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding. On the 29th day of August, 1889, this chattel mortgage was filed in the proper clerk's office and the other deeds and mortgages were properly recorded or filed on that day or the following day.

Eighth. Mr. Cutler has duly foreclosed his chattel mortgage from Steele and himself became the purchaser of the property therein mentioned. Such property was received into his possession by virtue of such chattel mortgage some time in the spring of 1890, and was sold thereon to Cutler on or about the 6th day of September, 1890, and was then of a value greater than the amount of the plaintiff's judgment aforesaid against Steele for damages and costs.

15 Ninth. Neither the plaintiff nor Theodore Cutler had any notice or knowledge of the chattel mortgage from Steele to Cutler aforesaid prior to the filing thereof.

I find as conclusions of law thereon as follows:

First. Upon the facts as found the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler aforesaid remained unfiled.

Second. The transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler. At most it could only be complained of by some one having an interest in the estate of which it was part of the assets.

Third. In consequence of the failure to file the chattel mortgage given by Steele to Cutler and of the plaintiff becoming a creditor of Steele in the interim the said chattel mortgage was and is void as to her and of no effect.

Fourth. It appearing that the garnishee had property of the principal defendant at the commencement of these proceedings in his possession of value greater than the amount of plaintiff's judgment and which he has appropriated to his own use, judgment must be rendered in favor of the plaintiff and against said garnishee for the amount of plaintiff's judgment against the principal defend-

ant, Steele, and interest on the damages thereby recovered, in all $11,424.96.

H. F. SEVERENS, *Dist. Judge.*

[Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston *vs.* Dwight Cutler, garnishee of William Steele. Findings of law and fact. Filed May 20, 1891. C. L. Fitch, clerk.

16 March Term, A. D. 1891.

WEDNESDAY, *May* 20, 1891.

The court met pursuant to adjournment.
Present: The Honorable Henry F. Severns, district judge.

ANNA B. HUSTON
vs.
DWIGHT CUTLER, Garnishee of WILLIAM STEELE, Principal Defendant. } No. 2357.

This cause having been heretofore duly brought to trial before the court without a jury, and the said court, after hearing the proofs and allegations of the parties and the arguments of counsel, having taken this cause under advisement, and the said court having now found that the said garnishee defendant, Dwight Cutler, is guilty of the premises in the said plaintiff's declaration laid to his charge in manner and form as the said plaintiff hath in her said declaration complained against him, and the court having assessed the damages of the plaintiff on occasion of the premises over and above her costs and charges by her about her suit in this behalf expended at the sum of eleven thousand four hundred and twenty-four dollars and ninety-six cents ($11,424.96), therefore it is considered that said plaintiff do recover against the said garnishee defendant, the Dwight Cutler, her damages so assessed as aforesaid, together with her costs and charges aforesaid, to be taxed, and that the said plaintiff have execution thereof.

17 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant.

The defendant, Dwight Cutler, by his counsel, respectfully requests the court to amend the findings of fact found in this cause as follows:

1st. In the third paragraph thereof in the sentence commencing "On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have this

Steele note endorsed to her," strike out the words " with the assent of the plaintiff."

Also strike out the word " her " at the close of the sentence and insert in lieu of such word the words " the plaintiff."

2d. At the end of said third paragraph add the following:

" The plaintiff never, in fact, purchased the said Steele note, and at the time of the commencement of the suit against the principal defendant herein did not have and has not now any interest whatever therein nor in the judgment rendered thereon."

3*th*. In the seventh paragraph strike out the sentence:

" This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding," and insert in lieu thereof: " This chattel mortgage, real estate mortgage to Cutler, as well as the deed to Mrs. Steele, upon the delivery
18 of them to Cutler, were placed in his safe with the intention on his part to go within a day or two thereafter to Ionia county and have the same duly filed and recorded, but by reason of his being otherwise employed they were not filed or recorded until August 29th, 1889, but there was no actual fraud intended in such withholding."

GEO. A. FARR,
Att'y for D'f't Garnishee.

[Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, pl'ff, *vs.* Dwight Cutler, garnishee, &c., d'f't. Request to amend the findings. Filed Jun- 27, 1891. C. L. Fitch, clerk. Geo. A. Farr, att'y for d'f't garnishee.

19 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant.

And now comes the said garnishee defendant, Dwight Cutler, by his counsel, and excepts to the findings of law and fact filed in this cause as follows:

1st. In the third paragraph of the findings of fact the garnishee defendant excepts to the finding by the court that it was " with the assent of the plaintiff arranged to have this Steele note endorsed to her."

2d. In the seventh paragraph of the findings of fact the garnishee defendant excepts to the finding that " this chattel mortgage and the other securities and deeds mentioned in the preceding para-

graph were withheld from filing or recording for the time being by an understanding of the parties."

3d. The said defendant excepts to the first conclusion of law found by the court, that—

"Upon the facts as found the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler remained unfiled."

4th. The said defendant excepts to the second conclusion of law found by the court, that—

20 "The transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler. At most it could only be complained of by some one having an interest in the estate of which it was part of the assets."

5th. The said defendant excepts to the third conclusion of law found by the court, that—

"In consequence of the failure to file the chattel mortgage given by Steele to Cutler and of the plaintiff becoming a creditor of Steele in the meantime, the said chattel mortgage was and is void as to her and of no effect."

6th. The said defendant excepts to the fourth conclusion of law found by the court, that—

"It appearing that the garnishee defendant had property of the principal defendant at the commencement of these proceedings in his possession in value greater than the amount of the plaintiff's judgment, and which he has appropriated to his own use, judgment may be rendered in favor of the plaintiff and against said garnishee for the amount of the plaintiff's judgment against the principal defendant, Steele, and interest on the damages thereby recovered, in all $11,424.96."

7th. The said defendant also excepts to the court's not amending its findings as requested by the defendant in each and every of his requests numbered from 1 to 3, both inclusive.

GEO. A. FARR,
Att'y for D'f't Garnishee.

[Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, pl'ff, *vs.* Dwight Cutler, garnishee d'f't, &c., d'f't. Exceptions to findings of law and fact. Filed Jun 27, 1891. C. L. Fitch, clerk. Geo. A. Farr, att'y for d'f't garnishee.

21 UNITED STATES OF AMERICA, } ss:
Western District of Michigan, }

To the honorable justices of the Supreme Court of the United States:

And now comes Dwight Cutler, of the city of Grand Haven, Michigan, in said district, by J. C. Fitzgerald, his attorney, and complains that in the records and proceedings and also in the rendition of judgment in a suit between Anna B. Huston, plaintiff, and the said Dwight Cutler garnishee defendant of William Steele, prin-

cipal defendant, tried in the circuit court of the United States for said western district of Michigan, southern division, at March term thereof, A. D. 1891, and in which judgment was rendered against him, as such garnishee defendant aforesaid, on the 20th day of May, A. D. 1891, manifest error hath intervened, to the great damage of the said Dwight Cutler; wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid

Dated June 27th, 1891.

J. C. FITZGERALD,
Attorney for Dwight Cutler.

Allowed.

[Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, pl'ff, *vs.* Dwight Cutler, garnishee, &c., def't. Petition for writ or error. Filed Jun- 27, 1891. C. L. Fitch, clerk. J. C. Fitzgerald, att'y for petitioner.

22 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant, Plaintiff in Error,
vs.
ANNA B. HUSTON, Defendant in Error.

I hereby admit due personal service upon me of a true copy of the annexed assignments of error in the above-entitled cause.

Dated June 27th, 1891.

THOMAS F. McGARRY,
Survivor of Self and M. H. Ford, Deceased,
Att'y for D'f't in Error.

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant, Plaintiff in Error,
vs.
ANNA B. HUSTON, Defendant in Error.

And now, on this 27th day of June, A. D. 1891, comes the said Dwight Cutler, by J. C. Fitzgerald, his attorney, and says that in the record and proceedings aforesaid in the circuit court of the United States for the western district of Michigan, southern division, and in the giving of judgment aforesaid there is manifest error—that is to say:

1st. There is error in this, that by the record aforesaid it appears that the circuit court in its findings of fact in the third paragraph thereof found that—

23 "On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have the Steele note endorsed to her."

There being no testimony given upon the trial of said cause to support such finding.

2d. There is also error in this: The circuit court erred in refusing to add, at the request of the counsel for the garnishee defendant, to the end of the third paragraph of said findings, the following:

"The plaintiff never in fact purchased said Steele note, and at the time of the commencement of the suit against the principal defendant herein did not have and has not now any interest whatever therein nor in the judgment rendered thereon."

3d. There is also error in this: In the seventh paragraph of the findings of fact by the circuit court the court found:

"This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding."

There being no testimony given upon the trial of said cause to support said finding.

4th. There is also error in this: The court erred in refusing to strike out from the seventh paragraph of the findings of fact the following:

"This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding."

And to insert in lieu thereof the following:

24 "This chattel mortgage, real estate mortgage to Cutler, as well as the deed to Mrs. Steele, upon the delivery of them to Cutler, were placed in his safe with the intention on his part to go within a day or two thereafter to Ionia county and have the same duly filed and recorded, but, by reason of his being otherwise employed, they were not filed or recorded until August 29th, 1889, but there was no actual fraud intended in such withholding."

5th. There is also error in this: The circuit court erred in its first conclusion of law in the findings of law and fact, said conclusion of law as found by the court being:

"Upon the facts as found the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler remained unfiled."

6th. There is also error in this: The said circuit court also erred in its second conclusion of law found by the court, that—

"The transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler; at most it could only be complained of by some one having an interest in the estate of which it was part of the assets."

7th. There is also error in this: The circuit court in its third conclusion of law also found:

"In consequence of the failure to file the chattel mortgage given

by Steele to Cutler and of the plaintiff becoming a creditor of Steele in the meantime, the said chattel mortgage was and is void as to her and of no effect."

8th. There is also error in this: The circuit court in its fourth conclusion of law found:

"It appearing that the garnishee had property of the prin-
25 cipal defendant at the commencement of these proceedings in his possession in value greater than the amount of plaintiff's judgment and which he has appropriated to his own use, judgment should be rendered in favor of the plaintiff and against said garnishee for the amount of plaintiff's judgment against the principal defendant, Steele, and interest on the damages thereby recovered, in all $11,424.96."

9th. There is also error in this: In the circuit court's directing a judgment to be entered for the plaintiff and against the garnishee defendant.

Wherefore, and for divers causes, manifest errors appearing in the said record and proceedings, the said plaintiff in error, by J. C. Fitz Gerald, his attorney, prays that the judgment rendered in said circuit court may be reversed.

J. C. FITZ GERALD,
Attorney for Plaintiff in Error.

[Endorsed:] No. 2357. The Supreme Court of the United States. Dwight Cutler, garnishee d'f't, &c., pl'ff in error, *vs.* Anna B. Huston, d'f't in error. Assignments of error. Filed Jun 27, 1891. C. L. Fitch, clerk. J. C. Fitz Gerald, att'y for pl'ff in error.

26 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Sixth Circuit and Western District of Michigan.

ANNA B. HUSTON, Plaintiff, Defendant in Error,
vs.
DWIGHT CUTLER, Garnishee Defendant, Plaintiff in Error.

Know all men by these presents that we, Dwight Cutler, of Grand Haven, Michigan, as principal, and Chas. E. Wyman and Sherman H. Boyce, as sureties, are held and firmly bound unto the above-named Anna B. Huston in the penal sum of seventeen thousand dollars, to be paid to the said Anna B. Huston; for the payment of which, well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 27th day of June, 1891.

Whereas the above-named Dwight Cutler has sued out a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for said sixth circuit and western district of Michigan on the 20th day of May, 1891:

Now, therefore, the condition of this obligation is such that if the said Dwight Cutler shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make said plea good, then this obligation to be void; otherwise of full force and virtue.

DWIGHT CUTLER. [SEAL.]
CHAS. E. WYMAN. [SEAL.]
SHERMAN H. BOYCE. [SEAL.]

STATE OF MICHIGAN, } ss:
County of Ottawa, }

On this —st day of June, 1891, at the city of Grand Haven,
27 Michigan, before me, a notary public for said county, personally appeared Chas. E. Wyman and Sherman H. Boyce, who acknowledged that they were each worth the sum of seventeen thousand dollars over and above all debts, exemptions, and liabilities.

CARRIE B. SLAYTON,
Notary Public, Ottawa Co., Mich.

STATE OF MICHIGAN, } ss:
County af Ottawa, }

Charles E. Wyman and Sherman H. Boyce, of the city of Grand Haven, Michigan, being duly sworn, each for himself says that he is one of the sureties who signed and is named in the within bond; that he is worth the sum of seventeen thousand dollars over and above all debts, exemptions, and liabilities.

CHAS. E. WYMAN.
SHERMAN H. BOYCE.

Subscribed and sworn to before me this 27th day of June, 1891.

CARRIE B. SLAYTON,
Notary Public.

The within bond is hereby approved in form and substance, including the sufficiency of the sureties.
June 27th, 1891.

H. F. SEVERENS,
U. S. Dist Judge.

[Endorsed:] Supreme Court of the United States. Dwight Cutler, garnishee, etc., pl'ff in error, *vs.* Anna B. Huston, def't in error. Bond on error. Filed Jun- 27, 1891. C. L. Fitch, clerk.

28 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the sixth circuit and southern division of the western district of Michigan, Greeting:

Because that in the record and proceedings and also in the rendition of the judgment in a plea which is in the said circuit court, before you or some of you, between Anna B. Huston, plaintiff, and Dwight Cutler, garnishee defendant of William Steele, principal de-

fendant, is defendant, a manifest error has intervened, to the great damage of the said defendant, Dwight Cutler, garnishee, as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-fifth day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of said circuit court, at Grand Rapids, the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[COPY SEAL.] CHARLES L. FITCH,
Clerk of the Circuit Court for the Western District of Michigan.

Allowed by—
H. F. SEVERENS,
U. S. Dist. Judge.

This 27th day of June, A. D. 1891.

[Endorsed:] Supreme Court of the United States. Dwight Cutler, garnishee, etc., pl'ff in error, *vs.* Anna B. Huston, def't in error. Copy of writ of error for defendant. Deposited Jun- 27, 1891. C. L. Fitch, clerk. J. C. Fitz Gerald, att'y for pl'ff in error.

29 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Western District of Michigan, Southern Division.

ANNA B. HUSTON, Plaintiff,
vs.
DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant.

At a session of said court held at the court-house, in the city of Grand Rapids, in said western district of Michigan, on the 20th day of May, A. D. 1891, before the Hon. Henry F. Severens, district judge, the issue joined between the parties in this cause came on to be tried before the said court without a jury, the jury being duly waived.

The plaintiff, to maintain the issue on her part, then read in evidence the deposition of Theodore Huston, taken at Chicago, Illinois, on December 10th, 1890, who testified that he resided in Macomb, Illinois, though he spent the greater part of his time in Chicago;

that he was in business in Chicago and there nearly all his time; that he first commenced business in Chicago about the first of November, 1889; that he was the son of Rigdon Huston, late of Blandinsville, Illinois, now deceased, and that he was one of the executors of his estate; that the executors of the estate are himself, Theodore Huston, his uncle, John Huston, and his brother, Charles R. Huston. "I have a certified copy of the will and letters testamentary of Rigdon Huston and now here produce the same;" and the same was received in evidence, a copy of which is
30 hereto attached and marked Exhibit No. 1.

Witness further testified that the executors all qualified and are acting in that capacity at the present time, and that the estate has not been finally settled; that he knew William Steele, of Ionia, Michigan; that said executors had business dealings or relations with said Steele; that Steele bought cattle at an executors' sale November 21st and 22nd, 1888; the sale was a public sale; that he did not pay for the property purchased, but gave a note for $9,600, due on or before one year after date, at six per cent. interest, eight after maturity; that the note was given to the executors of Rigdon Huston's estate; that the note has not been paid; that at that time he, the witness, John Huston, and Charles R. Huston were acting as executors of said estate.

Q. Do you know whether or not there was any investigation by the executors, or any of them, as to the responsibility of Mr. Steele at or before the time this note was taken?

A. There was.

Q. By whom?

A. By myself.

Q. State what you did.

A. I examined, if I remember correctly, Bradstreet's reports, and also talked with other parties who are personally acquainted with Mr. Steele and his circumstances; who represented to be acquainted with him and his circumstances. I think I talked with James M. Turner, of Lansing, Michigan, and Professor Johnson—I think he is at Lansing—of the Agricultural college, and C. F. Moore, of St. Clair, Michigan, and some others, I think. There were a good many Michigan people here at the sale, all of whom were acquainted with Mr. Steele.

Q. What was the result of your investigations?

A. Mr. Turner introduced Mr. Steele to me about six or
31 seven months before this sale, if I remember correctly. He represented him to be a very wealthy man, and my talks with all these other Michigan men corroborated that. I found he was very well rated in Bradstreet's reports. If I remember correctly, he was rated in such reports as worth from two hundred to three hundred thousand dollars; credit, the highest mark.

Q. Did you communicate the results of your investigations to the other executors?

A. I did to my uncle, who was present. My brother was not here at the time. The sale was here at Chicago at which Mr. Steele

bought this stock. I communicated with my uncle that evening as to the result of my investigations as to Mr. Steele's standing.

Q. What were the conditions of your sale as advertised—the terms?

A. The terms of settlement were approved bankable note, one year after date, bearing six per cent. interest from date, eight per cent. after maturity, two per cent. discount for cash. We sold other stock and property at that same time and took notes.

Q. Generally speaking, to how many parties and in what amounts?

A. There were, if I remember correctly, seventy-six animals sold at this two days' sale for an aggregate of between forty-three and forty-four thousand dollars. Mr. Steele's note was $9,600. That was the largest note we took. William Wright, of Detroit, Michigan, gave a note of $4,400. They ranged all the way from $100 to $9,600. The $9,600 note was the largest and was the only one that exceeded five thousand dollars.

Q. What, if anything, did the executors do with those notes after obtaining them in the way you have already stated?

A. They were placed in Grisby Brothers & Co.'s bank at
32 Blandinsville, Illinois, where we did our business, for safe-keeping and collection. Whoever deposited the notes took receipts therefor. Sometimes I deposited them and sometimes my brother and sometimes my uncle. Sometimes we were together. There were a great many notes put in there.

Q. What was the principal business of your father?

A. He was a breeder and seller of short-horn cattle for about thirty-five years prior to his death.

Q. What did his estate chiefly consist of at the time of his decease and what were the executors called upon chiefly to administer upon?

A. It consisted of twelve hundred acres of real estate valued at about fifty thousand dollars and about seventy-five thousand dollars was personal property—cattle and horses and a few notes. This sale at Chicago November 21st and 22nd, 1888, was not the only public sale that we had of cattle; we had two others.

Q. Are you acquainted with the plaintiff in this cause, Anna B. Huston?

A. Yes, sir; she is my wife.

Q. Under what circumstances did she obtain the note in question?

A. Along in August, 1889, I was contemplating going into business here in Chicago and expected to invest ten thousand dollars in business here, and there was about thirty thousand dollars worth of notes coming due about that time and I asked my brother and uncle if they thought I could get that amount of money from the estate about that time and they said they did not know whether they would be promptly paid or not, and finally agreed to take this Steele note and allow it to apply on my share, and they thought maybe it was not wise to let me have that much at that time. We finally agreed to count up the interest on the note and what-
33 ever it amounted to take my wife's and my joint note and apply

the balance on my distributive share as heir to the estate. When we calculated the interest and the note amounted to $10,025.60, I believe, and we agreed among ourselves that my wife and I give our joint note for five thousand dollars and me give a receipt to the executors of the estate for $5,025.60, to apply on my distributive share, and the matter was consum-ated in that way.

Q. What was done in consummation or in carrying out this agreement as to the particulars thereof?

A. This conversation took place in Blandinsville, on the picnic -rounds. It was the day of the farmer's picnic. We went to the bank that day. I think I got the note; asked the bankers for the note. I am not sure, though.

Q. What note?

A. For the Steele note, and we either assigned it at the bank, assigned it to Anna B. Huston, or at my uncle's house that day or the next. I am not sure which it was.

Q. That is, the executors turned it over to Anna B. Huston?

A. Anna B. Huston.

Q. What else was done?

A. And I went home and executed the note, and I and my wife signed and sent it to my uncle John Huston; a note for five thousand dollars.

Q. What about the receipt?

A. I gave them a receipt for $5,025.60 at the time the note was turned over to me.

Q. What was done with the Steele note?

A. It was delivered to me, and I think I sent it to you, Thomas F. McGarry, counsel for plaintiff in this cause.

Q. And you understand it was subsequently put in judgment, do you?

A. Yes, sir; I have been informed of the fact.

Q. In the case of Anna B. Huston *vs.* William Steele in this court?

A. Yes, sir.

34 Q. Why did you have the note endorsed over to your wife instead of yourself, if you wanted the use of it?

A. I was one of the executors myself and had to endorse it over, and my attorney advised me to have it assigned to my wife.

Q. Is your wife responsible financially?

A. Yes, sir.

Q. What, if anything, was done with the note that you and your wife gave to the executors of your father's estate?

A. It was either delivered to my uncle or to the bankers about the time it was given and kept with all the other notes that belonged to the estate.

Q. Was a receipt for that also given to the executors by the bankers?

A. Yes, sir.

Q. Did you at this time consult with anybody else besides your attorney with reference to doing this business in this way?

A. I think I consulted the judge of probate—the judge of the

probate court—who was a very good lawyer—as good as we have at that bar there.

Q. Why did you take this Steele note in this way if you wanted the money to go into business?

A. It was soon to become due—to come due—and would become due about the time I wanted to raise this money, and it was just the amount I wanted to raise, and it was the only note that amounted to that much; the other notes were small. I think the largest note aside from this was about four thousand five hundred dollars, and I considered it about the best one in the list—condered it gilt-edged. I had taken pains to inform myself.

Q. What did you do with reference to informing yourself at that time?

A. About that time or shortly before this note was transferred I examined Bradstreet's reports with reference to the signers of all the notes that we held except those that I was personally acquainted with, and Mr. Steele was rated better than any one else whose notes we had. I made that investigation with reference to this note.

Q. About how long before this transaction occurred did you make this examination?

A. I could not say exactly; I don't think it was any more than a week before.

Q. Was it before or after you and your uncle and brother had talked?

A. It was before.

Q. Did you know that Mr. Steele had given the garnishee defendant, Dwight Cutler, a chattel mortgage covering his personal property, including the property sold by the executors to Mr. Steele, of $40,000; also a real-estate mortgage of $25,000; also a deed to his wife, Nancy J. Steele, of the farm known as "the Home farm;" also a deed to his brother, Michael L. Steele, of the farm in Montcalm county; also a mortgage to his sister, Mrs. William E. Hancock, of $5,000 or thereabouts; also a mortgage to William Dunham of $20,000, *of* which, at this time you speak of, were withheld from record, or any of them?

A. No, sir; I knew absolutely nothing of them.

Q. Would you have entered into the agreement with the executors of your father's estate that you have testified to and given this note you have mentioned and the receipt that you spoke of if you had known those to be the facts?

A. I certainly would not.

Q. Would you if you had understood Mr. Steele to be in failing circumstances?

A. No, sir; I would not.

Q. Would you if you had not considered Mr. Steele absolutely responsible, and that the note would be paid at maturity or thereabouts?

A. I would not.

Q. What interest, if any, did your wife, Anna B. Huston,

36 have in this note or has she in the judgment which has been subsequently obtained against Mr. Steele?

A. She is personally liable on the note of five thousand dollars that she signed in that transaction.

Q. Was this done in this way in your behalf and interest?

A. It was.

Q. Did you move from your home in Macomb, Illinois, and come to Chicago to engage in the banking business?

A. I did.

Q. What amount of money did you invest in your business in Chicago?

A. Ten thousand dollars.

Q. How did you obtain it?

A. I paid five thousand dollars in cash and gave a ninety-day note for five thousand dollars.

Q. How did you obtain the money—where did you get the money from to go into business?

A. It was money that I had; five thousand dollars that I put in in cash. I got the five thousand dollars from Mr. Irish and the other $5,000 I got from various sources that had been paid in; it has not all been paid.

Q. As an advance from the estate, was it not?

A. Yes, sir.

Q. I think you misunderstand my question. How did you obtain the money; where did you get the money from to go into business?

A. I received it from the estate.

Q. How did you get the other $5,000?

A. Borrowed it.

Q. At the time you borrowed the money, how did you expect to pay the note when it fell due?

A. I expected to pay it from the proceeds of this Steele note.

Q. When did you learn that Mr. Steele had given the conveyances that I called your attention to?

A. I think it was some time in October.

Q. What did you do, then, if anything?

A. I went to Ionia, Michigan, to see what the real condition of Mr. Steele was, and I employed counsel there to look after it.

37 Q. Have you any way of fixing the date when this agreement for the purchase of the Steele note was consummated?

A. It was consummated the same day that the five-thousand-dollar note was dated.

38 Q. I hand you a note and ask you if it is the note you testified to as having been signed by you and your wife and delivered to the executors at the time of the consummation of the agreement with them concerning the purchase of the Steele note.

A. This is the note and that is the date on which the other note was transferred.

Q. I call your attention to a paper purporting to be a receipt and ask you to state if that is the receipt that you have testified to as having been given by yourself to the executors of your father's estate at the time this arrangement was consummated.

A. Yes; this was the receipt and the following is a copy:

"BLANDINSVILLE, ILL., *August 17th*, 1890.

Received of John and Chas. R. Houston five thousand twenty-five and $\frac{60}{100}$ dollars to apply on my distributive share as heir to R. Huston's estate.

THEODORE HUSTON."

This 17th day of August, 1890, is the date on which this transaction of obtaining this note from the estate occurred.

Q. Have you ever made a report of your doings as executor to the probate court of your county?

A. Yes; and I have with me a certified copy of that report. This report contains a reference to this transaction in relation to these notes and such report was approved by the probate court.

Q. I will ask you as to whether or not on this 17th day of August, 1899, at the time this arrangement was consummated, you regarded that as binding and final upon yourself and wife.

A. I did.

The following is a copy of the report filed in probate court so far as it related to this transaction:

"August 17, '90.—Received from Theodore Huston, per
39 Anna B. Huston, in payment of William Steele's note of November 22d, 1888, for nine thousand six hundred dollars, bearing six per cent. from date, ten thousand twenty-five and $\frac{60}{100}$ dollars. Received from Theodore Huston to apply on his distributive share as heir to R. Huston's estate five thousand twenty-five and $\frac{60}{100}$ dollars. Loaned Theodore Houston five thousand dollars."

On his cross-examination the witness further testified: This report was submitted to the probate court in September, 1890. I made it up; had been at work on it just before it was submitted. The last time that I saw Mr. Steele was in November, 1889. It was at his farm in Ionia, Michigan. I had a conversation with him there, and he and I agreed upon a settlement. I agreed to take back certain stock in lieu of the note if he would turn it out to me. It was the animals he purchased originally of us, and he was to give his individual note for the interest. I had no instructions when I went there as to what I should do.

Q. Did you tell him you owned this note?

A. I think I did.

Q. You did consider that you owned it, didn't you?

A. Yes; I considered that my wife and I owned it.

Q. You were in fact the beneficial owner of it yourself, weren't you—that is, it was in fact your note for your individual use?

A. Yes; I suppose it was.

Q. And so you considered it entirely proper to tell Mr. Steele at that time that you owned it?

A. I don't remember whether that question came up or not.

Q. You have said that you told him that you owned it?

A. I say I think I did.

40 Q. And you told him so, understanding that you did own it, didn't you—that is, you were the beneficial owner of that note and had a right to settle it in any way you chose?

A. I did propose to settle it.

(Question repeated.)

A. I never told him that; no.

Q. No, not in those words, I don't say; but you understood that you did own that note at that time, didn't you?

A. Yes.

Q. You have the same understanding now, have you not?

A. I understand that I owned it with the liability attached to myself and wife.

Q. This $5,000 that is mentioned in that book, that is considered to be the balance left on this Steele note, is it not?

A. Yes, sir.

Q. So here in your own handwriting in this book in which you kept the executor's account you have entered, loaned to yourself $5,000, which means the balance of this Steele note after deducting the $5,025.60 which you gave a receipt for. You charged yourself with so much received. You then charge yourself with $5,000, which was the balance of the Steele note.

A. Well.

Q. Just look at it.

A. I did not charge myself with it; no.

Q. How is it? Read it.

A. I charge the estate with it—that is, I gave the estate credit for the $5,000. The $5,000 note I gave the receipt for was payable in one and two years after date, and I supposed I had more in the estate than the $5,025.60.

Q. And it was out of this balance coming to you that this $5,000 was to be paid ultimately, was it not?

A. No, sir; there was no understanding about that. I
41 expect to pay it out of whatever proceeds I have. I don't know just where it will come from. I intend to pay it.

Q. In your paying that note your wife would not have any interest whatever—that is, any contingent interest in the note?

A. She would have no interest. I don't know that I understand you.

Q. I say, you paying that $5,000 your wife would not have any, even contingent or remote, interest in that note, would she?

A. I don't suppose any one would have any interest in it after it was paid.

Q. I mean the Steele note.

A. I don't know that I understand you.

Q. Why did you say that they advised you to have your wife sign a note with you?

A. I was one of the executors myself.

Q. And they thought it would be a little dubious to lend the estate's money to yourself, was that it?

A. I don't know as to that.

Q. What do you think about it?

A. What do I think about it, was their reason for it?
Q. Yes.
A. I do not know what their reason was.
Q. Why did you go to any one and ask about it?
A. Why did I go?
Q. Yes; why did you go to any one to ask how you should work this?
A. Well, I did not know whether it was a proper thing to sign a note over to myself or not.
Q. Then her name was attached to it simply for the purpose under advice, as you say, of giving it some character outside of the administration?
42 A. I was advised by an attorney to have it signed that way; Mr. Niece, who was the estate's attorney in all their business.
Q. When did you send this note to your counsel, Mr. McGarry?
A. I don't remember as to that. It must have been in October or November, 1889, as near as I can remember.
Q. Did you tell him to put it in judgment?
A. I had a talk with Mr. McGarry when I was up there first, and left it wholly to him to do and act as he thought best, and I afterwards sent the note to him. I did not know Mr. McGarry until I went up there. I don't remember whether I sent it by letter or how.
Q. I understand that you are the real party in this transaction in regard to this Steele note?
A. I understand that my wife and I were both parties to it, inasmuch as she gave her note.
Q. It was only in that way that she became a party; you were the party in interest?
A. That was the only way in which she became interested.

The witness on his redirect examination further testified:

Mr. Steele never carried out his agreement to make this settlement, would not write me a letter, and could not get his ear until I went to see him personally. The agreement with Mr. Steele was contingent on Mr. Cutler's releasing the property from the mortgage, and he never got it released, so far as I know. About that settlement, Mr. Steele wanted to know if we could not fix it up in some way and turn me back the stock, and I refused to take the stock that he originally bought because it had depreciated in value.
I talked with him most the whole day, and towards evening
43 the best thing I could get him to do was to give me the animals that he originally purchased. I wanted to know if we could get the cattle away that day, and he said no. I asked him why, and he said Cutler had a mortgage on it. I asked him if he could not telegraph to Mr. Cutler and get his consent and let me have these animals, and he said I could not do that. He said he would not want to give me a letter to Mr. Cutler. He said he would have to see him personally. I said, "How soon could you see him?" and he said he would see him in a day or two. He said he sup-

posed it would be a week before he could get to see him. He said he had some business matters that demanded his attention the next day and the following day, so I could not wait. I asked him to let me know as soon as he heard from Mr. Cutler and he said he would. He never notified me that he had obtained any release from Mr. Cutler.

Q. If you don't pay the note that you and your wife have given to the estate will she not be called upon to pay it?

A. Yes, sir. At the time I took this Steele note, amounting to a little more than ten thousand dollars, I was wanting to go into business here in Chicago and use ten thousand dollars in money. At the same time my father's estate was owing B. F. Irish, of Colchester, Illinois, $8,000. I consulted the other executors and they thought we had better pay Mr. Irish $5,000 at that time, the estate then having a little more than that amount in bank. Mr. Irish had previously asked me to take the money if I wanted it, so I went to him and gave him my individual note for the $5,000, and by his direction drew upon the estate the same day for the $5,000. Mr. Irish thereupon endorsed $5,000 as a payment upon the note of $8,000 and gave a receipt to the executors for that amount. In this way I got the estate money, but as a loan from Mr. Irish. The other $5,000 which I got to go into business I gave my individual notes for to parties here in Chicago, and the notes were negotiated at the Fort Dearborn National bank and the money obtained on them at that bank and used in my business here.

Counsel for the plaintiff, to further maintain and prove the issue on her part, then introduced and read in evidence the deposition of JAMES H. GRIGSBY, which was taken at Chicago, Illinois, December 10th, 1890, and who testified that he resided at Blandinsville, Illinois; was engaged in banking business and had been since May, 1882. The name of his firm was Grigsby Bros. & Co., and that he is manager of said firm; that he knew Rigdon Huston in his lifetime; that he knew of sale of the stock by the executors mentioned by last witness, and there were notes deposited in his bank from such
44 sale, and that he gave the executors receipts therefor, the receipts being for the safe keeping of the notes. I remember the note in question—the one given by William Steele to the executors of Rigdon Huston's estate for $9,600, dated November 21st, 1888, due on or before one year after date, at six per cent. interest until due and eight per cent. after that. I know the note, and the following is a copy of the note, with the endorsements thereon:

"$9,600. BLANDINSVILLE, ILLS., *Nov.* 22*d*, 1888.

On or before one year after date we promise to pay to the order of executors of Rigdon Huston's estate, at the Second National Bank of Ionia, Mich., the sum of ninety-six hundred dollars, at the rate of six per cent. per annum, and eight per cent. per annum from maturity, value received.

WILLIAM STEELE."

Upon the back of which is endorsed as follows:

"For value received we assign the within note to Anna B. Huston this 17th day of August, 1889. (Signed) John Huston, Theodore Huston, Chas. R. Huston, executors of Rigdon Huston's estate."

I remember this note being taken from the bank. It was some time in August, 1889. I could not tell the exact date, but it was about the middle of August. The note now here shown me, of which the following is a copy:

"BLANDINSVILLE, ILL., *Aug. 17th*, '89.

On or before two years after date we promise to pay to the order of the executors of Rigdon Huston's estate, at the banking-house — Grigsby Bros. & Co., at Blandinsville, Ill., the sum of five thousand dollars; interest at the rate of six per cent. per annum.

ANNA B. HUSTON.
THEODORE B. HUSTON."

This note was left at our bank August 20th, 1889. It is
45 possible it might have been handed to me a day or two before that, and it has been in my possession ever since that time.

The plaintiff, to further maintain the issue on her part, then read in evidence the deposition of JOHN HUSTON, which was taken at Chicago, Illinois, on the 10th day of December, 1890, who testified that he resided at Blandinsville, Illinois; that he was a farmer by occupation; that he was a brother of Rigdon Huston, deceased, and one of the executors of his estate, and remembers the sale of the stock in question to William Steele.

Q. Do you know whether or not any investigation was made as to the responsibility of Mr. Steele before the acceptance of his note at the time of that sale?

A. On the evening of the sale I asked my nephew, Theodore, in regard to Mr. Steele's responsibility, and he said that he was all right. After this conversation we took his note.

Q. As to whether you would have taken the note unless you considered Mr. Steele responsible?

A. Certainly not.

Q. What was done with the note after that?

A. It was placed in the bank of Grigsby Bros. & Co. and receipt taken for it. Other notes were placed there at the same time, and they were all left there for safe keeping.

Q. When, if ever, was the Steele note of $9,600 taken from the bank?

A. It was taken from the bank on or about August 17th, 1889.

Q. Under what circumstances and for what purpose?

A. Theodore spoke to Charlie and myself in regard to
46 wanting some money. The amount of money that he wanted to use was expressed at about ten thousand dollars, I think, and he wanted to know if we could let him have at least $5,000. We did not have that amount of cash funds to spare outside of the

business, and the proposition came up to let him have the Steele note. I think he made the proposition to take the Steele note and receipt us for $5,000 and give us a note signed by himself and wife for the rest of it. I did not see any objection to accommodating him in this way.

Q. What was done with reference to carrying out this arrangement?

A. The note was turned over to Anna B. Huston and Theodore Huston, and Theodore gave his receipt for $5,000 or $5,025. I don't remember which it is. He gave us a receipt for $5,025.60, and his wife and himself gave us jointly a note for $5,000.

Q. As to whether Mrs. Anna B. Huston is financially responsible?

A. I think so.

Q. As to whether or not, at the time of the consummation of this transaction which you have just testified to, you knew anything about Mr. Steele having given to Mr. Cutler and to the members of his family and to Dunham mortgages and conveyances which had been withheld from record?

A. I knew nothing of it.

Q. As to whether or not this arrangement that you have testified to was regarded as final and binding or optional with Mr. Theodore Huston and wife?

A. It was regarded as final and binding as any other transaction would be.

Q. How is it regarded now?

A. It is regarded as binding upon them.

47 Upon his cross-examination the witness further testified:

Q. Who brought you the note signed by Theodore Huston and Anna B. Huston?

A. I don't remember, sir, whether it was sent to me by mail or sent directly to the bank.

Q. Who did you deliver the Steele note to?

A. Theodore.

Q. It was considered to be a loan to Theodore, wasn't it, for his use?

A. I did not go into the question of whose use it was to be.

Q. It was considered to be a loan to Theodore, wasn't it?

A. Yes; I think so.

Q. Did you understand his wife's name was placed upon the note for the purpose of getting around the fact that he was an executor?

A. It was his proposition. I simply accepted it.

Q. That was Theodore's share of the estate?

A. In what way do you mean?

Q. What was his interest in the estate at that time?

A. At that time there were three heirs.

Q. Do you consider Theodore responsible?

A. Yes, sir.

Q. When was this understanding with you in regard to letting Theodore have the Steele note?

A. I think it was the 17th day of August, 1889. I think the Steele note was due one year after date and the sale was the 21st and 22d of November, 1889.

Q. Was Theodore Huston in business in Chicago at that time?

A. Indeed I don't know.

On his redirect examination the witness further testified :

48 Theodore Huston was at that time sheriff of the county of McDonough, Illinois. I reside in that county, about twenty miles from the residence of Theodore Huston.

It was then and there orally agreed between the counsel for the plaintiff and the counsel for the defendant before the commissioner who took the preceding depositions that Charles B. Huston, who was then present, would testify substantially the same in the trial of said cause as the last preceding witness.

The plaintiff, to further maintain the issue on her part, called WILLIAM D. PLACE, a witness, who was produced and sworn and testified as follows :

I reside in the township of Ionia, county of Ionia, State of Michigan. I am county clerk of said county. I am acquainted with the value of cattle, blooded and graded and common. I own at the present time about 100 cows and run a large dairy ; am personally acquainted with the herd of cattle formerly owned by William Steele, the principal defendant in this case, and included in the chattel mortgage given by William Steele to Dwight Cutler, the garnishee defendant herein. Our pasture lands join, and I have had occasion to frequently look over the cattle and admire them; have also been supervisor of the township of Ionia for several years, in which township Mr. Steele, the principal defendant, resides, and have as such appraised said property. In my judgment this herd of cattle was worth on the 5th day of August, 1890, between $25,000 and $30,000.

49 The plaintiff, to further maintain and prove the issue on her part, then introduced and read in evidence the examination of the garnishee defendant, DWIGHT CUTLER, as follows :

I am the garnishee defendant in this case. In my disclosure in this case as garnishee I stated that on the 13th of July, 1890, Steele gave me a chattel mortgage to secure the payment of $40,000 ; that year is incorrect ; it should be 1889.

July 13th, 1889, William Steele, the principal defendant, was indebted to me for money before then loaned to him to the amount of $8,000, and I had also prior to that date, at the request and for the accommodation of said Steele, endorsed his commercial paper and was then liable thereon as such endorser to the extent of about $20,000. Steele at that date was also indebted to the First National Bank of Grand Haven, of which bank I was president, in the sum of $12,000. Three or four days prior to July 13th, 1889, Steele, who then resided at Ionia, called on me at Grand Haven and requested me to indorse further for him to the amount of $25,000. I told

him I did not want to endorse and I had not the money to loan him. Steele then offered to give a mortgage on his farm to secure such loan. I told him I could get the money of Mrs. Savidge, but she would not loan it on the farm alone, but would want my endorsement. At this same time I asked him for security for what he owed me for money loaned, for my endorsement, and for what he owed the bank. It was then agreed that I should get the $25,000 for him of Mrs. Savidge; that he should secure it by mortgage on the farm, and would also give security for the aforesaid prior indebtedness and liability. Steele thereupon returned to Ionia, and on July 13th, 1889, returned to Grand Haven to complete this arrange-
50 ment, bringing with him the following mortgages, both of which bore date and were executed at Ionia July 12th, 1889.

One of them was a chattel mortgage and was given to secure said prior indebtedness and liabilities, and the following is a copy of the same:

51 Know all men by these presents that William Steele, of Ionia, Michigan, of the first part, being justly indebted unto Dwight Cutler, of Grand Haven, Michigan, of the second part, the sum of forty thousand dollars, has, for the purpose of securing payment of said debt and the interest thereof, granted, bargained, sold, and mortgaged, and by these presents does grant, bargain, sell, and mortgage, unto the said Dwight Cutler the following goods, chattels, and personal property, to wit: All the personal property, chattels, and effects now situated on the home farm, in the township of Ionia, Ionia county, Michigan, consisting of about one hundred and sixty head of short-horn Herford and Jersey cattle, cows, steers, bulls, and calves, about fifty sheep, fourteen horses worked and used on said farm and on the Dye & Carrell farm, in the township of Easton, in said county; also two Percheron stallions, all the hogs, pigs, farming implements, tools, and personal property used upon said farm and now situated thereon, excepting the household furniture and pair of bay horses, their harnesses and carriage, belonging to my wife, Nancy Jane Steele, and now used by her; also all the crops now growing and in the barns upon said farms, including all the hogs and other personal property on either of said farms, which said above-described goods, chattels, and property, at the date hereof, are situate at my home farm and the Dye & Carrell farm, in Easton township and in the township of Ionia, Ionia county, Michigan, and are free and clear from all liens, conveyances, incumbrances, and levies, and for a valuable consideration hereby warrant the above representations to be true:

To have and to hold the same forever: Provided always and the condition of these presents is such that if the said William Steele shall pay or cause to be paid the said D. Cutler all notes held by him, together with all notes of said Steele upon which said Cutler is endorsed, also any notes of said Steele held by the First
52 National Bank of Grand Haven, Mich., and any and all renewals thereof, together with all endorsements, loans, or

advances hereafter made by said Cutler to said Steele or liabilities incurred in his behalf at the maturity of notes or the renewal thereof, then this instrument shall be void and of no effect, and I, the said William Steele, agree to pay the same accordingly; but if default be made in *in* any such payment at their maturity, including the notes of said Steele held by the First National Bank of Grand Haven, Mich., said Cutler is hereby authorized to take and shall sell at private sale, without notice, or at public auction, after giving notice of sale like that which is required by law for constables' sales, the goods, chattels, and personal property hereinbefore mentioned, or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, and to retain the same out of the proceeds of such sale, the overplus or residue, if any, and if any, to belong and to be returned to said William Steele; and the said D. Cutler is hereby authorized at any time when he shall deem himself insecured, or if the said party of the first part shall sell, assign, or dispose of, or attempt to sell, assign, or dispose of, the whole or any part of the said goods and chattels, or remove or attempt to remove the whole or any part thereof from the said premises above mentioned without the written assent of the party of the second part, then and from thenceforth it shall and may be lawful for the said party of the second part, his executors, administrators, or assigns, or his, her, or their authorized agents, to enter upon the premises of the said part- of the first part, or any place or places where the said goods and chattels or any part thereof may be, and take possession thereof and the same retain in some
53 convenient place, at the risk and expense of said William Steele, until the said sum of money shall become due as aforesaid, and then to dispose of the same in the manner above specified.

In witness whereof the said party of the first part has hereunto set his hand and seal the twelfth day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

WILLIAM STEELE. [SEAL.]

Signed, sealed, and delivered in presence of—
JNO. B. CORLISS.
MICHAEL L. STEELE.

54 The other of said mortgages was a real-estate mortgage upon about five hundred acres of land situate in Ionia county, the home farm of said Steele; was executed by himself and wife; the consideration named in said mortgage was $25,000, and conditioned for the payment of $25,000, according to a certain promissory note executed by the said Steele, payable to the order of said Cutler, and bearing even date with said mortgage. This last-named mortgage was given to secure the payment of said sum of $25,000, then and there loaned to said Steele. Steele delivered these mortgages and note to me July 13th, 1889, at my office in Grand Haven, and I then and there indorsed said $25,000 note and delivered the same to Mrs. Savidge, who, and on the same day, paid over to said Steele the whole amount thereof.

When these mortgages were delivered to me I put them in my safe, expecting at that time to go up to Ionia county, where said mortgages should be filed and recorded, within a day or two and have them filed and recorded, but I was busy and neglected to do this until August 29th, 1889, at 5.25 p. m., when I caused the same to be duly filed and recorded.

I had been acquainted with Steele for sixteen or seventeen years prior to this transaction.

At the time Steele delivered to me these mortgages he also left with me a deed, given by himself to his wife, conveying the undivided one-half of the premises described in said mortgage and subject to said mortgage, and requested me to send the same for record with my papers when I sent mine for record, and I told him I would do so. I put these papers all in one envelope.

On the morning of the 29th of August, 1889, I received a dispatch from Steele, dated at Grand Rapids, requesting me to
55 send up his paper—his wife's deed; I sent it up. I took these mortgages and this deed from my safe and started for the train to take this deed to Steele and to put my mortgages on record. I got to the train and found our clerk there, who said he was going to Grand Rapids, and I gave the papers to him and told him to take them to Steele and tell him to put them on record. When he returned he told me he had done as requested.

I took possession of the personal property mentioned in the chattel mortgage in the spring of 1890, and the same was sold September 6th, 1890, under said mortgage to me for fifteen thousand dollars. There still remains more than $25,000 unpaid on said mortgage. The real-estate mortgage is in process of foreclosure. There has nothing whatever been paid on this $25,000 real-estate mortgage.

Counsel for the plaintiff, to further maintain the issue on her part, then offered and read in evidence the real-estate mortgage mentioned in the disclosure of the witness Cutler last above; also the chattel mortgage set forth in the disclosure of the said Cutler last above; also the deed given by the said William Steele to his wife referred to above, which bore date the 12th day of July, 1889, and was recorded on the 29th day of August, 1889, at 5.20 p. m., and conveyed the property as above expressed.

56 Also the mortgage bearing date the 12th day of July, 1889, given by said William Steele and wife to Mary M. Hancock upon certain real estate in Ionia county, to secure the payment of the sum of $5,200, which was recorded on the 29th day of August, 1889, at 5.30 p. m.; also a mortgage bearing date the 12th day of July, 1889, and recorded August 29th, 1889, at 5.40 p. m., given by the said William Steele and wife to William Dunham upon certain lands in Ionia county, conditioned that the said Steele should pay or cause to be paid any and all notes which the said Dunham then was or might thereafter endorse for him, the said Steele; also any personal notes of the said Steele held by the Fifth National Bank of Grand Rapids, Michigan, together with any renewals of such notes also a deed given by the said William Steele and wife to Michael L.

Steele and Jessie J. Steele of certain lands in Montcalm county, the consideration named in said deed being $15,000; which deed bore date the 12th day of July, 1889, and was recorded on the 30th day of August, 1889; also a bill of sale given by William Steele to James A. Steele, of lumbering outfit, together with certain horses therein mentioned; the consideration named in said bill of sale was $6,000. It bore date the 15th day of July, 1889, and was filed August 30th, 1889.

And thereupon the plaintiff rested her case.

The above and foregoing was all the testimony given upon the trial of said cause, and thereupon the case was submitted to the court.

57 And thereupon, after the findings of fact and law were made and filed in said cause, the counsel for the garnishee defendant, Dwight Cutler, duly requested the court to amend the findings of fact as follows:

The defendant Dwight Cutler, by his counsel, respectfully request the court to amend the findings of fact found in this cause as follows:

1st. In the third paragraph thereof, in the sentence commencing "On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have this Steele note endorsed to her," strike out the words "with the assent of the plaintiff."

Also strike out the word "her" at the close of the sentence and insert in lieu of such word the words "the plaintiff."

2d. At the end of said third paragraph add the following:

"The plaintiff never in fact purchased said Steele note and at the time of the commencement of the suit against the principal defendant herein did not have and has not now any interest whatever therein nor in the judgment rendered thereon."

3d. In the seventh paragraph strike out the sentence—

"This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding," and insert in lieu thereof—

58 "This chattel mortgage, real estate mortgage to Cutler, as well as the deed to Mrs. Steele, upon the delivery of them to Cutler, were placed in his safe with the intention on his part to go within a day or two thereafter to Ionia county and have the same duly filed and recorded, but by reason of his being otherwise employed they were not filed or recorded until August 29th, 1889, but there was no actual fraud intended in such withholding."

But the court then and there refused to grant said request and did not amend said findings; to which refusal the counsel for the said garnishee defendant did then and there duly except.

59 And inasmuch as the several matters and proceedings hereinbefore set forth do not appear of record, counsel for the garnishee defendant, Dwight Cutler, has duly proposed this bill of exceptions and requested that the same may be signed.

And thereupon the district judge, the presiding judge of said court who tried said cause, at the request of the counsel for the said garnishee defendant, Dwight Cutler, has duly signed this bill of exceptions this 27th day of June, A. D. 1891.

H. F. SEVERENS, *Dist. Judge.*

60 EXHIBIT "No. 1."

I, Rigdon Huston of Blandinsville township in the county of McDonough and State of Illinois of the age of 53 years on the 26th day of October 1886, being of sound mind and memory, do make publish and *the* declare the following to be my last will and testament.

First. It is my will that after my decease that all of my just debts and funeral expenses be fully paid.

Second. I give and bequeath unto my beloved wife the sum of four thousand dollars for the purpose of buying her a home whereever she may decide to live, and to furnish the same, to be paid to her by my executor or administrator as soon as the same can be realized out of the proceeds of my estate. Also the further sum of one thousand dollars annually during her natural life, to be paid to her in equal parts semi-annually by my children hereinafter named, to commence as follows: Theodore & Charlie to commence paying on the first day of January after my death and John H. and Luella to commence paying on the first day of April after my death. Said annuity so given to my beloved wife Lucy C. to be secured and to become a lien for and during her natural life. On the following real estate which I hereinafter will to my said children each child's piece or parcel of land to be encumbered with the amount only to be paid by him or her. The east half of the southwest quarter of section eight in township seven (7) north of range three west herein named as part of the land bequeathed to my son Theodore; the east half of the southeast quarter of section four (4) hereinafter named as a part of the land bequeathed my son Charlie—the south half of the northeast quarter of section three (3) hereinafter named as part of the land bequeathed my son John H. and the east half
61 of the southeast quarter of section ten (10) hereinafter named as part of the land bequeathed to my daughter Luella—all of the last three tracts of land mentioned being situated in township seven (7) north of range four west all being in McDonough county, Ill. Each tract of land above mentioned is to be encumbered only and is to stand as security for the payment of each child's part of the annuity hereinbefore mentioned to be paid to my beloved wife Lucy C.—Said lien to continue during the life of my said wife and I further give and devise to my beloved wife Lucy C. all the household and kitchen furniture of every kind or nature, to be her absolute property forever.

Third. I give and bequeath to my son Theodore Huston the southwest quarter of section eight (8) in township seven (7) north of range three (3) west in McDonough county, Illinois, also the east half of the northeast quarter of section thirty-six (36) in town-

ship eight (8) north of four (4) west in Henderson county Ill. to have and to hold the same forever subject to the incumbrance heretofore placed on the east half southwest of sec. 8 seven north three west.

Fourth. I give and bequeath to my son Charlie R. Huston the southeast quarter of section four (4) in township seven (7) north of range four (4) west in McDonough county, Ill. Also the west half of the northeast quarter of section thirty-six (36) in township eight (8) north of range four (4) west in Henderson county Ill., to have and to hold the same forever subject however to the encumbrance above placed on the east half of the said southeast quarter of section four (4).

Fifth. I give, devise and bequeath to my son John H. Huston the south half of the northeast quarter of section three (3) in township seven (7) north of range four (4) west and the southeast quarter of section three (3) in township seven (7) north of range four
62 (4) west, both in McDonough county, Ill., to have and to hold the same forever subject however to the encumbrance above placed on the said south half of the northeast quarter of section three (3).

Sixth. I give, devise and bequeath to my daughter Luella Huston the *the* northeast quarter of section ten (10) and the east half of the southeast quarter of section (10) both in township seven (7) north of range four (4) west to have and to hold the same forever subject to the incumbrance above placed on the said east half the said southeast quarter section ten (10).

Seventh. I give and bequeath to my son Charlie R. Huston the sum of two hundred dollars to be paid to him by my executor or administrator on the settlement of my estate to make him equal in amount of money expended on my other sons in schooling.

Ninth. After my death I desire and direct my executor or administrator to convert all of my personal estate into money and after the payment of all my just debts, funeral expenses and the costs of the administration and also the $4,000—to be paid to my said wife and the $200—to my son Charlie R.—which sums I direct to be paid out of my personal estate. The remainder I de-re to be equally divided share and share alike, between my four children above named.

Tenth. The four thousand dollars and the yearly annuity of $1,000 during her natural life and the household and kitchen furniture which I have bequeathed to my beloved wife I desire and direct that she receive the same in lieu of dower homestead specific allowance and her thirds which she may be entitled under the laws of the State of Illinois and before she receive the same that she file a relinquishment in writing in the county court, waive her
63 right to the said dower homestead specific allowance and thirds.

Eleventh. I desire and direct that my wife and children who remain at home with her be permitted to retain the homestead and to use such articles as may be necessary for their living free of

charge until such time as they may be provided for under the foregoing provisions.

Twelfth. I further direct inasmuch as my son John H. will receive in valuation $450 more than my other children in the land above willed to him that my executor or administrator on the final settlement of my personal estate pay to each of the other three of my children to wit: Theodore, Charlie R. and Luella the sum of one hundred and twelve dollars and fifty cents each out of the sum which may be going to the said John H.

Thirteenth. I further will and direct that *that* after applying the sum of $4,865.59 which I am owing my son Theodore upon a settlement made March 31st, 1887, as provided for by the terms of said settlement. That my estate shall have a lien upon the share herein willto the said Theodore to secure the estate against any loss the estate may sustain by virtue of any debt the estate may have to pay for the said Theodore on account of my having become his security and that his share of my estate shall be encumbered and my estate shall have a lien on the same to secure any such liability except that enough of the shares of my personal estate of the said Theodore may be applied to liquidate any liability which John C. Huston may be liable for as the security of the said Theodore.

Fourteenth. I further will and direct that my estate shall have a lien upon the share herein willed and bequeathed to my son Charlie R. to secure the estate against any loss my estate may sustain
64 by virtue of my being his security and that his share of my estate shall be held liable for the same.

Fifteenth. I hereby constitute and appoint my brother John Huston and my sons Theodore and Charlie R. Huston, executors of this my last will and testament and in closing out my personal estate I authorize them to use their best judgments in the manner of making sales and also the times and places of sales, and they may if in their judgments it is for the best interest of my estate hold my herd of fine cattle until such time as they may think they can realize the most for my estate.

And in case of disagreement as to the management of my estate by said executors I direct that my brother John Huston's decision shall control and his decision shall be final and he is to be the custodian of all the finance.

April 4th, 1887.

RIGDON HUSTON. [SEAL.]

Attest:

WM. BLACKHURST.
S. W. LEAVITT.
W. H. NEECE.

65 *Letters Testamentary.*

Estate of RIGDON HUSTON, Deceased.

STATE OF ILLINOIS, *McDonough County,* } ss:

In County Court, May Term, 1887.

The People of the State of Illinois to all to whom these presents shall come, Greeting:

Know ye that whereas Rigdon Huston, late of the county of McDonough and State of Illinois, died on or about the seventh day of May, A. D. 1887, as it is said, after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this State which may be lost, destroyed, or diminished in value if speedy care be not taken of the same; and inasmuch as it appears that John Huston, Theodore Huston, and Charlie R. Huston have been appointed executors in and by the said last will and testament to execute the same—

Now, to the end that the said property may be preserved for those who shall appear to have a legal right or interest therein, and that the said will may be executed according to the request of the said testator, we do hereby authorize them, the said John Huston, Theodore Huston, and Charlie R. Huston, as such executors, to collect and secure all and singular the goods and chattels, rights and credits, which were of the said Rigdon Huston at the time of his decease, in whosesoever hands or possession the same may be found in this State, and well and truly to perform and fulfil all such duties as may be enjoined upon them by the said will, so far as there shall be property and the law charge them, and in general to do and perform all other acts which now are or hereafter may be required of
66 them by law.

Witness C. W. Dines, clerk of the county court of the said county of McDonough, at his office, in Macomb,
[COPY SEAL.] this 24th day of May, A. D. 1887, and the probate seal of said court hereunto affixed.

C. W. DINES, *Clerk.*

I, C. W. Dines, clerk of said county court, do certify that the foregoing is a full and true copy of the original letters testamentary in my office remaining.

Given under my hand and the seal of the said court this twenty-fourth day of September, A. D. 1890.

C. W. DINES, *Clerk.*

66½ [Endorsed:] No. 2357. The circuit court of the United States for the western district of Michigan, southern division. Anna B. Huston, pl'ff, *v.* Dwight Cutler, garnishee d'f't, d'f't. Original bill of exceptions. Filed June 27, 1891. C. L. Fitch, clerk. Geo. A. Farr, att'y for d'f't garnishee.

67 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant, Plaintiff in Error,
vs.
ANNA B. HUSTON, Defendant in Error.

I hereby admit due personal service upon me of the within citation issued in the above-entitled cause.
Dated June 27th, 1891.

THOMAS F. McGARRY,
Survivor of Self & M. H. Ford, Deceased,
Att'y for Def't in Error.

68 UNITED STATES OF AMERICA, *ss:*

To Anna B. Huston, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 25th day of July next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and southern division of the western district of Michigan, wherein Dwight Cutler, as garnishee of William Steele, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of June, A. D. 1891.

H. F. SEVERENS,
U. S. Dist. Judge.

68½ [Endorsed:] No. 2357. Supreme Court of the United States. Dwight Cutler, garnishee, &c., pl'ff in error, *vs.* Anna B. Huston, d'f't in error. Citation. Filed Jun. 27, 1891. C. L. Fitch, clerk. J. C. Fitz Gerald, att'y for pl'ff in error.

69 UNITED STATES OF AMERICA:

Supreme Court of the United States.

DWIGHT CUTLER, Garnishee Defendant of WILLIAM STEELE, Principal Defendant, Plaintiff in Error,
vs.
ANNA B. HUSTON, Defendant in Error.

I hereby admit due personal service upon me of the within writ of error in the above-entitled cause.
Dated June 27th, 1891.

THOMAS F. McGARRY,
Survivor of Self and M. H. Ford, Deceased,
Att'y for Def't in Error.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the sixth circuit and southern division of the western district of Michigan, Greeting:

Because that in the records and proceedings, and also in the rendition of the judgment in a plea which is in the said circuit court, before you or some of you, between Anna B. Huston, plaintiff, and Dwight Cutler, garnishee defendant of William Steele, principal defendant, *is* defendant, a manifest error has intervened, to the great damage of the said defendant, Dwight Cutler, garnishee as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-fifth day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause
71 further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of said circuit court, at Grand Rapids, the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Seal of the U. S. Circuit Court, Southern Division, Western District of Mich.

CHARLES L. FITCH,
Clerk of the Circuit Court for the Western District of Michigan.

Allowed by—
H. F. SEVERENS,
U. S. Dist. Judge.

This 27th day of June, A. D. 1891.

71½ [Endorsed:] No. 2357. Supreme Court of the United States. Dwight Cutler, garnishee, &c., pl'ff in error, *vs.* Anna B. Huston, def't in error. Writ of error. Filed Jun. 27, 1891. C. L. Fitch, clerk. J. C. Fitz Gerald, att'y for pl'ff in error.

72 THE UNITED STATES OF AMERICA, } *ss:*
Western District of Michigan, Southern Division, }

I, Charles L. Fitch, clerk of the circuit court of the United States for the western district of Michigan, do hereby certify that the foregoing is a true and compared copy of the record in a certain cause in said circuit court, wherein Anna B. Huston is plaintiff and Dwight Cutler, as garnishee of William Steele, is defendant, and of

the whole thereof, now remaining of record in my office, and also of the declaration, plea, judgment, entry, and taxed bill of costs in the principal cause of Anna B. Huston *vs.* William Steele, to which said first-mentioned cause is ancillary.

And I further certify that the bill of exceptions, writ of error, and citation hereto annexed and herewith returned are the original bill of exceptions, writ of error, and citation heretofore filed with me in said first-mentioned cause.

Witness my official signature and the seal of said circuit court, at Grand Rapids, in said district, this 8th day of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and sixteenth.

{ Seal of the U. S. Circuit Court, Southern Division, Western District of Mich. }

CHARLES L. FITCH, *Clerk.*

Endorsed on cover: Case No. 14,743. W. Michigan C. C. U. S. No. 549. Dwight Cutler, plaintiff in error, *vs.* Anna B. Huston. Filed July 15, 1891.

RECORD, CASE No. 14,743.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No. 549.

DWIGHT CUTLER,
Plaintiff in Error,
vs.
ANNA B. HUSTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Brief, Points and Argument on Behalf of Plaintiff in Error.

STATEMENT OF CASE.

In this action plaintiff in error is proceeded against as garnishee of one William Steele against whom the defendant in error claims to have recovered judgment.

The principal facts disclosed by the Record are as follows: On November 22nd, 1888, the said Steele purchased some cattle of the executors of the last will and testament of Rigdon Huston, deceased, and in payment thereof gave his note reading as follows:

$9,600.00. BLANDINSVILLE, ILL., Nov. 22, 1888.

On or before one year after date we promise to pay to the order of Executors of Rigdon Huston's Estate at the 2nd

National Bank of Ionia, Mich., the sum of nine thousand six hundred dollars at the rate of six per cent. per annum, eight per cent. per annum from maturity, value received.

(Signed) WM. STEELE.

(Record, pp. 2, 10 and 20.)

Steele was then reputed good and was rated in Bradstreet's commercial reports as worth from $200,000 to $300,000. (Record, p. 20.)

Theodore Huston is a son and one of the four residuary legatees of Rigdon Husted, deceased, and is also one of his executors, the other two executors being Charlie R. Huston, another son, and John Huston, a brother of the deceased. (Record. pp. 20 and 37, 38.)

The defendant in error, Anna B. Huston, is the wife of Theodore. (Record, p. 21)

On July 12th, 1889, over seven months after Steele gave the above-mentioned note, he, Steele, was indebted to Dwight Cutler, the plaintiff in error, in the sum of $8,000 for money previously loaned, and to the First National Bank of Grand Haven, of which Cutler is president, in the sum of $12,000, Cutler being also liable as accommodation endorser on his, Steele's, paper to the amount of $20,000, and, being so indebted, Steele then desired a further indorsement for $25,000. (Record, p. 31.)

Cutler refused to endorse, and an agreement was made whereby Cutler made a further loan of $25,000 of the money of one Mrs. Savidge then in his hands, taking as security a mortgage on real estate, and took also as security for the money before then loaned by him personally and the indebtedness then existing to the bank and the amount for which he was liable as accommodation endorser, in all amounting to $40,000, a chattel mortgage on a large amount of personal property, consisting principally of farming stock. (Record, pp. 32, 33.)

These mortgages were made and delivered at Grand Haven, where Mr. Cutler resided, which is about sixty miles distant from Ionia, the county seat of Ionia County, wherein Steele

resided; Mr. Cutler placed them in his safe, expecting to go to Ionia shortly and then to take them with him to file them. but, being otherwise engaged, neglected to do so until August 29th, 1889 (Record, p. 34). No fraud or bad faith existed in delaying the filing of the mortgage (see 7th finding of fact of Court, Record, p. 11), and no transaction of any kind occurred in the interim between the principal defendant Steele and Mrs. Huston, the defendant in error, or those through whom she claims.

August 17th, 1889, after the mortgage was made and before it was filed, the following proceedings were taken concerning the note: Theodore Huston desired to obtain a portion of his share of the residuum of his father's estate for the purpose of using it in business. Not having any available cash on hand belonging to the estate, it was agreed between the three executors that this Steele note, which then, with accrued interest, was computed to amount to $10,025.60, should be turned out to him, and that he, with Anna B., his wife (defendant in error), should execute a note for $5,000 to the executors as for a loan, and that he should receipt to the executors for $5,025.60 on account of his share of the residuum. (Record, pp. 21-22.)

Theodore was advised by his attorney (who was also the attorney of the executors), to have the note assigned to his wife, the defendant in error. as he was one of the executors and as such would have to join in the transfer of the note, and accordingly the following was endorsed on the Steele note:

" For value received we assign the within note to Anna B. Huston this 17th day of August, 1889.

(Signed) JOHN HUSTON,
THEODORE HUSTON,
CHAS. R. HUSTON,
Executors of Rigdon Huston's Estate."
(Record p. 29.)

and the following note was made:

"BLANDINSVILLE, ILL., Aug. 17th, '89.

On or before two years after date we promise to pay to the

order of the executors of Rigdon Huston's Estate at the banking house—Grigsby Bros. & Co. at Blandinsville, Ill., the sum of five thousand dollars, interest at the rate of six per cent. per annum.

ANNA B. HUSTON,
THEODORE B. HUSTON."

(Record p. 29.)

and the following receipt was given:

"BLANDINSVILLE, ILL., August 17, 1890.

Received of John and Chas. R. Huston five thousand twenty-five and 60–100 Dollars to apply on my distributive share as heir to R. Huston's Estate.

THEODORE HUSTON."

(Record p. 25.)

and thereupon the Steele note was delivered to Theodore Huston, who subsequently sent it to his attorney T. F. McGarry for collection, (Record p. 22.) the entire transaction being for his sole benefit, and Anna B. Huston, his wife, having no interest whatever therein and taking no part in the transaction save that she signed the $5,000 note with her husband, (Record pp. 23–24) and it does not appear that she had any knowledge or even information, that the Steele note was, or purported to be, assigned to her in any manner.

On December 24th, 1889, suit was commenced in the Circuit Court of the United States for the Western District of Michigan in the name of Anna B. Huston, plaintiff, against William Steele, defendant on the note in question, and, there being no defence made, judgment thereon was rendered, upon inquest, March 15th, 1890, for $10,410, damages and costs, taxed at $31.80. (Record p. 3.)

N. B. That suit was commenced by declaration, and, although the plaintiff therein, Anna B. Huston, is therein described as being a citizen of the State of Illinois, no statement is made of what state or country William Steele, the sole defendant therein, is a citizen, (Record p. 1) nor is there anything in the record of the principal suit to show that Steele is a citizen of any State other than Illinois. The first statement

that Steele is a citizen of the State of Michigan is found in the affidavit for the Writ of Garnishment made August 5th, 1890, over four months after the entry of the judgment in the principal case. (Record p. 5.)

In the spring of 1890 (the precise date does not appear), Mr. Cutler took the property mentioned in the chattel mortgage into his possession and proceeded to foreclose the chattel mortgage by suit in chancery in the State Court, viz.: the Circuit Court for the County of Ionia in Chancery, and, under the decree of that Court, caused sale of the property to be made on September 6th, 1890, for $15,000, being himself the purchaser, leaving $25,000 still unpaid thereon. (Record, p. 34.) On August 5th, 1890, before the sale but after the plaintiff in error had commenced the foreclosure suit and had taken possession of the property, the summons in garnishment in this case was issued, and was served August 7th. (Record, pp. 6–7.) The disclosure of the plaintiff in error as garnishee was filed August 19th, 1890, and shows a decree rendered in said State Circuit Court in Chancery finding over $40,000 due on the mortgage and directing a sale (Record, p. 8), and the subsequent examination of the plaintiff in error as such garnishee, made after the sale under such decree, shows in detail rhe indebtedness, the giving of the chattel mortgage and of the real estate mortgage and all matters connected therewith, showing conclusively that the chattel mortgage was given and accepted in good faith to secure a bona fide indebtedness and was foreclosed at a loss of $25,000, and that the $25,000 loaned on July 12th, 1889, on the real estate mortgage remains wholly unpaid and that that real estate mortgage is in process of foreclosure (Record, pp. 31 to 34). The statements of plaintiff in error in his disclosure and subsequent examination are not disputed in any manner.

The principal questions involved in this case are:

Did the defendant in error become a creditor in good faith of the principal defendant, William Steele, in the interim between the making of the chattel mortgage and the filing

thereof, so as to avoid the chattel mortgage as to her, under the provisions of the statute of the State of Michigan? (2 How. Stat. of Mich., § 6193.)

This involves the determination of the following:

Was there a valid transfer of the Steele note to the defendant in error? and if so,

Did the assignment of the note to her by the executors of Rigdon Huston's estate (who were the payees thereof) give to the defendant in error any greater rights against the chattel mortgage in question than those of the payees thereof?

It must also be determined:

Was the Court below warranted by the evidence in its findings of fact? and,

Had the Court jurisdiction?

FINDINGS OF FACT.

The Court found the facts as follows:

First—On the 22d day of November, 1888, the principal defendant, William Steele, executed and delivered to the executors of Rigdon Huston's estate, for a valuable and sufficient consideration, his promisory note for the sum of $9,600, payin one year from that date, with interest at six per cent.

Second—The said Rigdon Huston died on or about the 7th day of May, 1887, leaving several legatees, of whom Theodore Huston, the husband of the plaintiff, was one. The said Theodore Huston was one of the executors of the will of Rigdon Huston, also, there being two others, namely, John Huston and Charlie R. Huston. The decedent and all the persons named in this paragraph resided in the State of Illinois.

Third—The plaintiff's husband, contemplating going into business which required capital, was desirous of obtaining from the said estate some portion—the share coming to him as aforesaid, and, upon his application to the other executors of said will, it was agreed between all three that the said

Steele note should be turned over to him upon his giving back his note, signed also by the plaintiff, for the sum of $5,000, payable to the executors of said will in one or two years from its date.

Theodore Huston wished and intended to use this Steele note as collateral for the purpose of raising money for the use of his business above mentioned. On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have this Steele note endorsed to her. The agreement in its several parts, as stated in this paragraph, was executed and consummated on the 17th day of August, 1889, by the endorsement to the plaintiff of the said note of Steele by the three executors aforesaid and the delivery to them of the note of Theodore Huston and the plaintiff for the sum of $5,000, aforesaid. This last amount being the excess of the Steele note over the advancement on Theodore Huston's share in said estate then intended to be made, the note of Theodore and his wife was given and received to represent and stand in lieu of the portion of said note not intended to be then advanced.

Fourth—There was no actual fraud on the part of any of the parties to the transactions mentioned in paragraph three.

Fifth—The plaintiff brought suit on said Steele note in this Court on the 14th day of December, 1889, and recovered judgment against the maker on the 15th day of March, 1890, for the sum of $10,410, damages and costs, taxed at $31.80.

Sixth—On the 12th day of July, 1889, the garnishee defendant, Dwight Cutler, was a creditor of William Steele in a considerable sum and had also endorsed Steele's notes for a considerable amount, and it was contemplated that possibly Cutler might make other advances to Steele. Steele was possessed of a large and valuable property, but was deeply in debt. On the day last mentioned he executed a number of conveyances and mortgages covering the substance of his property to various parties; among the rest a real estate

mortgage for $25,000 to Mr. Cutler to secure the re-payment of that sum that day loaned by Cutler to Steele.

Seventh—On the aforesaid 12th day of July, 1889, the said Steele executed and delivered a chattel mortgage covering a large amount of personal property to the said Cutler, the condition of said mortgage being as follows: That " Steele shall pay or cause to be paid the said D. Cutler all notes held by him, together with all notes of said Steele's upon which said Cutler is endorser; also any notes of said Steele held by the First National Bank of Grand Haven and any and all renewals thereof, together with any endorsements, loans, or advances hereafter made by said Cutler to said Steele, or liabilities incurred in his behalf at the maturity of notes or the renewals thereof, then this instrument shall be void and of no effect."

The possession of the property mortgaged was not changed, but remained with the mortgagor. This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended by such withholding. On the 29th day of August, 1889, this chattel mortgage was filed in the proper clerk's office, and the other deeds and mortgages were properly filed or recorded on that day or the following day.

Eighth—Mr. Cutler has duly foreclosed his chattel mortgage from Steele and himself became the purchaser of the property therein mentioned. Such property was received into his possession by virtue of such chattel mortgage some time in the spring of 1890, and was sold thereon to Cutler on or about the 6th day of September, 1890, and was then of a value greater than the amount of the plaintiff's judgment aforesaid against Steele for damages and costs.

Ninth—Neither the plaintiff nor Theodore Cutler (error for "Huston", see Record, p. 11) had any notice or knowledge of the chattel mortgage from Steele to Cutler aforesaid prior to the filing thereof.

Conclusions of Law by the Court thereon:

First—Upon the facts as found the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler aforesaid remained unfiled.

Second—The transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler. At most it could only be complained of by some one having an interest in the estate of which it was part of the assets.

Third—In consequence of the failure to file the chattel mortgage given by Steele to Cutler and of the plaintiff becoming a creditor of Steele in the interim, the said chattel mortgage was and is void as to her and of no effect.

Fourth—It appearing that the garnishee had property of the principal defendant at the commencement of these proceedings in his possession of value greater than the amount of plaintiff's judgment and which he has appropriated to his own use, judgment must be rendered in favor of the plaintiff and against said garnishee for the amount of plaintiff's judgment against the principal defendant, Steele, and interest on the damages thereby recovered, in all, $11,424.96. (Record, pp. 9, 10, 11, 12.)

The counsel for plaintiff in error requested the Court to amend its findings of fact as follows:

First—In the third paragraph thereof, in the sentence commencing "On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have this Steele note endorsed to her," strike out the words "with the assent of the plaintiff."

Also strike out the word "her" at the close of the sentence and insert in lieu of such word the words "the plaintiff."

Second—At the end of said third paragraph, add the following: "The plaintiff never, in fact, purchased the said Steele note, and at the time of the commencement of the suit against the principal defendant herein did not have and has not now any interest whatever therein nor in the judgment rendered thereon."

Third—In the seventh paragraph strike out the sentence: "This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding," and insert in lieu thereof: "This chattel mortgage, real estate mortgage to Cutler, as well as the deed to Mrs. Steele, upon the delivery of them to Cutler, were placed in his safe with the intention on his part to go within a day or two thereafter to Ionia County and have the same duly filed and recorded, but by reason of his being otherwise employed they were not filed or recorded until August 29th, 1889, but there was no actual fraud intended in such withholding." (Record, pp. 12 and 13.)

The Circuit Court refused such requests and the counsel for the plaintiff in error duly excepted to said findings of fact whereto such amendments were refused and to the several conclusions of law, and to the refusals to amend. (Record, pp. 13 and 14.)

The Assignments of Error are as follows:

First—There is error in this, that by the Record aforesaid it appears that the Circuit Court in its findings of fact, in the third paragraph thereof, found that:

"On account of the legal obstacle to transferring the note to himself, Theodore, with the assent of the plaintiff, arranged to have the Steele note endorsed to her." There being no testimony given upon the trial of said cause to support such finding.

Second—There is also error in this: The Circuit Court erred in refusing to add, at the request of counsel for the garnishee defendant, to the end of the third paragraph of said findings, the following:

"The plaintiff never, in fact, purchased said Steele note, and at the time of the commencement of the suit against the principal defendant herein did not have and has not now any interest whatever therein nor in the judgment rendered thereon."

Third—There is also error in this: In the seventh paragraph of the findings of fact by the Circuit Court the Court found:

"This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding." There being no testimony given upon the trial of said cause to support said finding.

Fourth—There is also error in this: The Court erred in refusing to strike out from the seventh paragraph of the findings of fact the following:

"This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding." And to insert in lieu thereof the following:

"This chattel mortgage, real estate mortgage to Cutler, as well as the deed to Mrs. Steele, upon the delivery of them to Cutler, were placed in his safe with the intention on his part to go within a day or two thereafter to Ionia County and have the same duly filed and recorded, but, by reason of his being otherwise employed, they were not filed or recorded until August 29th, 1889, but there was no actual fraud intended in such withholding."

Fifth—There is also error in this: The Circuit Court erred

in its first conclusion of law in the findings of law and fact, said conclusion of law as found by the Court being:

"Upon the facts as found the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler remained unfiled."

Sixth—There is also error in this: The said Circuit Court also erred in its second conclusion of law found by the Court, that:

"The transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler; at most it could only be complained of by some one having an interest in the estate of which it was a part of the assets."

Seventh—There is also error in this: The Circuit Court in its third conclusion of law also found:

"In consequence of the failure to file the chattel mortgage given by Steele to Cutler and of the plaintiff becoming a creditor of Steele in the meantime, the said chattel mortgage was and is void as to her and of no effect."

Eighth—There is also error in this: The Circuit Court in its fourth conclusion of law found:

"It appearing that the garnishee had property of the principal defendant at the commencement of these proceedings in his possession in value greater than the amount of plaintiff's judgment and which he has appropriated to his own use, judgment should be rendered in favor of the plaintiff and against said garnishee for the amount of plaintiff's judgment against the principal defendant, Steele, and interest on the damages thereby recovered, in all $11,424,96."

Ninth—There is also error in this: In the Circuit Court's directing a judgment to be entered for the plaintiff and against the garnishee defendant. (Record, pp. 15, 16 and 17.)

ARGUMENT AND AUTHORITIES.

Before proceeding to discuss the questions in this case on the merits we call the attention of the Court to the point that the judgment entered in the principal case, Anna B. Huston vs. Wm. Steele, is void for want of jurisdiction.

The Record of the pricipal case states that the plaintiff, Anna B. Huston, is a citizen of the State of Illinois, but is entirely silent as to the citizenship of William Steele, the defendant therein, and there is absolutely nothing in the record of that case (Record, pp. 3 and 4) from which it can even be inferred that Steele was a citizen of any state other than Illinois.

It does not appear that this point was raised in the Court below. Of course in the principal case the plaintiff in error, being defendant in garnishment only, could not have been heard to make the objection *in that case;* but it is essential to his rights as garnishee that, before attempting to hold him liable as such, the defendant in error should show affirmatively that she has a valid judgment against the principal defendant.

McClosky vs. Wayne Circuit Judge, 26 Mich., 100.
Laidlaw vs. Morrow, 44 Mich., 547, 550.

In the case of Robertson vs. Cease, 97 U. S., 646, the objection to the jurisdiction on the ground that it did not appear that the plaintiff was a citizen of a different state to the defendant was allowed to be raised for the first time in this Court by the defendant, no question as to jurisdiction having been raised in the Court below.

In Grace vs. American Central Insurance Co., 109 U. S., 278, it did not appear that the parties were citizens of different states. No objection to the jurisdiction was made either in the Court below or in this Court by either party, but in rendering its decision this Court, on its motion, raised the point, stating in the words of Mr. Justice Harlan: "As the jurisdiction of the Circuit Court is limited in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a

cause is without its jurisdiction unless the contrary affirmatively appears."

In both of the above cited cases it was averred that the plaintiff in each case respectively was a *resident* of a different state from the defendant, but a mere averment of *residence* was held in each case not equivalent to an averment of *citizenship.*

In the present case there is no averment of either the *residence* or *citizenship* of the defendant, William Steele, in the principal case, the only averment being: "Complains of William Steele, who.....citizen of the State of..... of a plea," etc. (Record, p. 1.) This is not a typographical error of a printer, but is a true copy of the record.

As the liability of a garnishee is dependent entirely upon the recovery by the plaintiff of a valid judgment in the principal case, it follows that where a defect in jurisdiction exists in the principal case the garnishee proceedings are without foundation and the garnishee cannot be held liable.

In Laidlaw vs. Morrow 44th Mich. 547 the defendant had, as garnishee in a former proceeding by a creditor against plaintiff's assignor, in good faith paid over the full amount of her indebtedness, and defendant set this up as a defence. On examining the record of the original case it was apparent that no jurisdiction was acquired to render judgment against the principal defendant and it was therefore held that the judgment in the garnishment case was a nullity and, although actually paid in good faith, afforded no defence against the assignee of the debt supposed to have been garnished.

Noble vs. Thompson Oil Co., 79 Pa. State, 354, was also a case where the defendant had paid a judgment rendered against him as garnishee of the plaintiff. On examing the record it was found that the Court rendering the judgment in the garnishment case had not acquired jurisdiction to render it, and the judgment, although paid, was held to be a nullity and no defense to an action for the debt.

If a Court act without authority, its judgments will be regarded as nullities, and the jurisdiction of a Court exercising

authority over a subject matter may be inquired into in every Court where the proceedings of the former are relied upon by a party claiming benefit therefrom.

Greenvault vs. Farmers', etc., Bank, 2 Doug. Mich., 498.

This is not a collateral attack on the judgment in the original case, but it is a failure of the defendant in error to put herself in such a position as to entitle her to maintain this ancillary proceeding by having obtained a vaild judgment against the principal defendant, William Steele, which is a condition precedent to her right to pursue the plaintiff in error as garnishee.

Parties whose interests are prejudiced may always take advantage of the want of jurisdiction of the Court where the prejudicial action was taken.

Gillett vs. Needham, 37 Mich., 143.
Breen vs. Pangborn, 51 Mich., 29.
King vs. Merritt, 67 Mich., 194.

The questions presented by the assignment of error are the following:

First—As to matters of fact found by the Trial Court.

First and Second Assignments of Error. (Record 15 and 16.)

In the third paragraph of the findings of fact the Trial Court finds that "On account of the legal obstacle to transferring the note to himself, Theodore, *with the assent of the plaintiff*, arranged to have the Steele note endorsed to her" and refused to add to that paragraph a finding that "the plaintiff never in fact purchased said Steele note and, at the time of the commencement of the suit against the principal defendant herein, did not have and has not now any interest whatever therein nor in the judgment rendered thereon" as requested by the Counsel for plaintiff in error.

All the testimony given in the case concerning the transfer

of the note in question is that of Theodore Huston, John Huston and James H. Grigsby. And from their evidence it appears that the notes taken for the sales of stock including the Steele note were deposited for safe keeping in the bank of Grigsby Bros. & Co. at Blandinsville, Illinois (Record, pp. 21, 28 and 29) at which place John Huston resided (record p. 29). That Theodore at that time was Sheriff of the county of McDonough and resided at Macomb the County seat twenty miles distant from Blandinsville. (Record p. 31.)

Theodore contemplated going into the Banking business at Chicago and for that purpose desired to obtain about $10,000. as an advance on his distributive share of said Estate of Rigdon Huston deceased and on the occasion of a Farmer's picnic at Blandinsville in August 1889 Theodore proposed to his co-executors John Huston and Charlie R. Huston that they should turn out to him the Steele note which he had selected as being about the amount he needed and due about the time he should require it (Record, 23); John and Charlie R. demurred to letting him have so much at that time, and it was agreed there at that picnic that he, Theodore, should take the Steele note, which then amounted to $10,025.60, and should receipt for $5,025.60 on his distributive share and give a note, signed by himself and Anna B., his wife, for $5,000, and on the same day this Steele note was taken from the Grigsby bank and delivered to him. (Record, Theodore Huston, 22; Grigsby, 29; John, 29.) At Theodore's request the assignment of the Steele note was made to his wife, Anna B. (Record, Theodore, 22; John, 30); after this Theodore went home and with his wife executed the $5,000 note and transmitted it to his uncle John, as he says (Record, 22), and either to his uncle or Grigsby's bank, as John says (Record, 30). It was received at the bank August 20 (Record, Grigsby, 29). The assignment, receipt and $5,000 note are all dated August 17, which is also the date of the report of the transaction to the Probate Court (Record, 27 and 29), which was evidently the date of the farmers' picnic on which the agreement was made, and it is also evident that Anna B. Huston was not at that farmers' picnic, or it would not have been necessary for Theodore to

return to his home at Macomb to obtain her signature to the $5,000 note. She therefore certainly knew nothing of the transfer *at the time it was made.* John testifies that the transfer was made to Anna merely because Theodore so desired and that he delivered the Steele note to Theodore and considered the $5,000 note as a loan to Theodore; (Record, p. 30). Theodore says he procured it to be made in Anna's name because he was so advised by Mr. Niece his Attorney who was also Attorney for the Estate. (Record, 22 and 27.) Theodore has since held possession of the note treating it as his own (Record, 23) and testifies that it was in fact his note for his own individual use (ecord, 25) and that his wife (the Defendant in Error) had no interest therein save that she signed the $5,000 note with him and that this was done on his behalf and interest. (Record, 24). It is evident that the only connection the Defendant in Error had in the matter was as surety for her husband Theodore on the $5,000 note and there is no proof whatever that she ever saw or heard of the Steele note, nor that she had any idea that such a note was in existence. It is noticeable that her husband, Theodore, is absolutely silent as to any communication between her and himself concerning the transaction. She was not called for a witness and no excuse for not calling her is given.

We therefore submit that the finding of fact that "Theodore, *with the assent of the plaintiff*, arranged to have the Steele note transferred to her," is without any evidence to support it and is moreover in direct contradiction to the evidence on the part of the plaintiff, and is inconsistent with any reasonable inference of fact that can be drawn from such evidence, and the words "with the assent of the plaintiff" should be stricken out from the said finding; and that the facts proposed by counsel of plaintiff in error to be added after such striking out, viz.: "The plaintiff never in fact purchased the Steele note, and at the time of the commencement of the suit against the principal defendant herein, did not have and has not now any interest therein nor in the judgment rendered thereon," are proved incontestibly to be the facts by the testi-

mony of the ptaintiff's own witnesses, and no evidence exists tending to show the contrary.

Third and fourth assignments of error:

The Court found in the seventh paragraph of findings of fact that "That this chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or recording for the time being *by an understanding of the parties*, but there was no actual fraud intended in such withholding."

The only evidence as to the reasons for withholding the papers from filing or record is found in the examination of the plaintiff in error as garnishee (Record, pp. 31 to 34), and he testified: "When these mortgages were delivered to me, I put them in my safe, expecting at that time to go up to Ionia County, where said mortgages should be filed and recorded, within a day or two and have them filed and recorded, but I was busy and neglected to do this until August 29th, 1889" (Record, p. 34). There is nothing in this record, direct or circumstantial, to contradict this nor to show that the papers were withheld from record or filing by any *understanding* whatever or even *intentionally* nor by consent nor even with the *knowledge* of Steele. The Court should have substituied for this finding that requested by counsel for plaintiff in error, viz.: "This chattel mortgage, real estate mortgage to Cutler, as well as the deed to Mrs. Steele, upon the delivery of them to Cutler, were placed in his safe with the intention on his part to go within a day or two thereafter to Ionia County and have the same duly filed and recorded, but by reason of his being otherwise employed they were not filed or recorded until August 29th, 1889, but there was no actual fraud intended in such withholding" (Record, p. 13), which is in accordance with all the evidence on that subject.

As the bill of exceptions contains all the evidence given at the trial (Record, p. 35), the Court will be able to see that the findings of fact should be modified as above set forth before proceeding to consider the questions of law in the case.

Second—Errors in conclusions of law.

Fifth assignment of error:

The Court erred in its first conclusion of law that "The plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of § 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler aforesaid remained unfiled" (Record, 11.)

Sec. 6193 of Howell's Annotated Statutes of Michigan is as follows: "Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof, shall be filed in the office of the Township Clerk of the township, or City Clerk of the city, or City Recorder of cities having no officer known as the City Clerk, where the mortgagor resides."

The foregoing statute is held in Michigan to apply only to creditors who have become such during the interim between the making and the filing of the instrument, or who have during such interim obtained a lien on the property mortgaged by levy of execution or attachment or the like, or who have during such interim granted extensions or renewals to the mortgagor.

Feary vs. Cummings, 41 Mich., 376–383.
Waite vs. Mathews, 50 Mich., 392–393.
Root vs. Harl, 62 Mich., 420–422.
Johnson vs. Stellwagen, 67 Mich., 10–13.
Brown vs. Brabb, 67 Mich., 17–35.

This conclusion of law is based on the theory that the assignment of the note to the defendant in error had the effect of constituting her a creditor at the time of the date of the assignment, yet in every case in which this statute has been construed in favor of creditors, *the indebtedness itself* has

originated in the interim, or the creditor had granted some extension or renewal of the original indebtedness on the faith of the non existence of the mortgage. Thus in case of Cutler vs, Steele, et al., 85 Mich., 627, (which was the foreclosure in Equity of this very mortgage) the mortgage in question was held valid as to all except those who had, in the interim between the makiug and filing thereof, granted renewals on new endorsements by Steele.

In the leading case in Michigan of Feary vs. Cummings, 41 Mich., 376, the debt which was preferred to the mortgage was *contracted* in the interim between the making and the filing of the mortgage.

Such was also the case in Dempsey vs. Pforzheimer, 86 Mich., 652, and in Crippen vs. Fletcher, 56 Mich., 386.

In Root vs, Harl, 62 Mich., 420, a mortgage withheld from record was held void only as to those creditors whose debts were contracted between the making and the filing thereof and those who had in that interim granted extensions and renewals of former debts and notes, and it was held valid as to all others.

In Waite vs. Mathews, 50 Mich., 392, the rule in Michigan is stated to be "that no one can complain of a failure to file a chattel mortgage for any length of time, unless, after its date and before its filing, or before possession taken under it, the creditor assailing it has *dealt with the mortgagor* as he would not have dealt had the mortgage been recorded, or else has secured some lien on the property," and the same principle is affirmed in Johnson vs. Stellwagen, 67 Mich., 10.

As was said by Campbell, J., in Waite vs. Mathews, 50 Mich., opinion p. 393, "In order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, some act must be done or some detriment sustained *during the interval.*" And in Root vs. Harl; 62 Mich., 420, the same learned Judge says, "New credits given are acts of this kind, but so are also extensions of time on old debts for any definite period and renewals of notes or other obligations." (Opinion p.

422.) This is the full extent to which this Statute has ever been applied in the Supreme Court of the State in which it was enacted.

In the present case no new credit has been given to the mortgagor, nor any extension of time, nor any renewal of any note or other obligation, in fact no transaction nor even communication of any kind whatever was had with Steele during the interim. His obligation remained precisely the same as it was on the day he gave the note to the executors.

At the time the executors took the note they were bound to know that he, Steele, could at any time secure any other creditor by chattel mortgage or otherwise if he saw fit so to do.

Johnson vs. Stellwagen, 67 Mich., opinion p. 13.

In Cragin vs. Carmichael 11 Bankruptcy Reg. 511 the U. S. Circuit Court in Iowa held 1st—that the effect of the non filing or non recording of chattel mortgages must be governed by the law of the State where the same was intended to take effect, and second that under the statute of Iowa, which is similar in this respect to that of Michigan, a chattel mortgage not recorded for over four months after it was given, took effect against all creditors who had not obtained a lien at the time of recording.

In the case of Brown vs. Brabb, 67 Mich. 17, a debtor having made a mortgage of chattels to secure an honest debt, it was by agreement with the mortgagor, left with the township clerk with instructions not to file it unless some other mortgage on the same property should be presented for filing. Before the mortgage was filed the mortgagor made a general assignment for the benefit of his creditors, which, in Michigan makes the assignee the representative of the creditors as well as of the assignor, and confers on the assignee "the right to recover all property or right, or equities in property which might be reached or recovered by any of the creditors of such assignor" 3 How. Ann. Stat. § 8741. The Court in a lengthy and carefully considered opinion, wherein the previous Michigan cases as well as many under similar statutes in other

states were reviewed, held substantially that the Statute was for the protection of those creditors only who had during the interim between the making of the chattel mortgage and the filing therof parted with some valuable thing or granted some valuable privilege to the debtor, on the faith of the property being unencumbered, such as granting the renewal of a note, an extension of time on an indebtedness, an advance of money or goods on credit or the like, the principle established by the authorities being that those who had dealt with the mortgagor himself in such a manner as they would not have dealt with him had they had notice of the mortgage, by giving him credit or the like, and those who have secured liens by due process of law are the only ones who can attack an unfiled chattel mortgage which was in fact given in good faith to secure an honest debt, for the reason that it was not filed pursuant to the Statute; and that as to all others it is valid.

Under the New York similar statute, from which that of Michigan was borrowed, this Court has held such a mortgage valid against an assignee in bankruptcy, there being no creditor who had given credit or obtained liens in the interim.

Stewart vs. Platt, 101 U. S., 731.

Similar decisions were made in

Wilson vs. Esten, 14 R. I., 621,

Shaw vs. Glen, 37 N. J. Eq., 32.

We submit that the statute was intended to protect only persons dealing in good faith with the mortgagor from the effects of a secret mortgage.

It is not disputed but that the mortgage is valid as against the original payees of the note, but it is claimed that the transfer to the defendant in error created a new relation of debtor and creditor with the same effect as if a new indebtedness had been incurred by the mortgagor during the interim.

But the transaction was at the most a mere substitution of one creditor for another and did not give the assignee of the debt any greater rights or remedies against the property of the debtor than the assignor had.

Howell vs. Medler, 41 Mich., 641–43.

Spinning vs. Sullivan, 48 Mich., 5–8.
Seligman vs. Estate of Ten Eyck, 49 Mich., 104–107.
Hamet vs. Dundass, 4 Barr (Pa. State), 178–182.

The defendant in error did not acquire the note in question by endorsement in the usual course of business, but by special assignment (Record, p. 2), under unusual dircumstances, not according to the ordinary course of the law merchant, but made for the express purpose of evading the law. Defendant in error being a mere nominal party, having no real interest in the note, and the person having the beneficial interest being her husband, Theodore Huston. (Theodore Huston's testimony, Record, pp. 22 and 27; John Huston's testimony, Record, pp. 29 and 30.)

It is well settled that where a note is assigned, otherwise than by endorsement in the usual course of business, the assignee only acquires the rights of the assignor.

Peck vs. Bligh, 37 Ill., 317.
Olds vs. Cummings, 31 Ill., 188.
Murray vs. Beckwith, 48 Ill., 391.
Spinning vs. Sullivan, 48 Mich., 5.
Aniba vs. Yeomans, 39 Mich., 171.
Merriam vs. Granite Bank, 8 Gray, 254.
Miller vs. Race, 1 Burr., 452–457.

Even where the assignment is by endorsement regular on its face, if in fact the endorsement was merely for convenience of collection the holder can recover only in such cases where his endorser could have done.

Wintermute vs. Torrent, 83 Mich., 555.

The utmost that can be claimed on the part of the plaintiff is that a pre-existing indebtedness to the executors of Rigdon Huston, deceased, which was incurred November 22d, 1888, was irregularly assigned to her August 17th, 1889, for the benefit of her husband, who was one of said executors, without the knowledge or consent of the debtor, Steele.

We say "without his consent," because although it may be argued that every maker of a negotiable note contents in advance to the transfer thereof in the usual manner recog-

nized by the law merchant it is evident that no such consent can be implied to a mere colorable transfer not according to the law merchant but made for the purpose of *evading* the operation of law.

Moreover the evidence shows that the transfer of the note to Mrs. Huston, the defendant in error, was never completed. The note was never delivered to her. (Record pp. 22, 23, 24, 25.)

It was delivered to Theodore Huston, her husband; not to her, but evidently because he was intended to be the actual owner of it and had the sole beneficial interest therein (Record pp. 22 and 25), the written assignment to her being merely to give the note some character outside of the administration. (Record 27.)

Delivery of the note to the assignee is essential to the transfer thereof.

Badgley vs. Votrain, 68 Ill., 25.
First N. Bank of Centralia vs. Strang, 72 Ill., 559.
Miller vs. Pondir, 55 N. Y,, 325.
O'Mulcahy vs. Holly, 28 Minn., 31.

There is no presumption that delivery to a husband is delivery to his wife. The authority of the husband to receive must be proved.

Banyard vs. Core, 82 Ill., 19.
Greenwood vs. Jenkle, 68 Ill., 319.
Three Rivers N. Bank vs. Gilchrist, 83 Mich., 253.
Fechheimer vs. Pierce, 70 Mich., 440.

Sixth Assignment of Error.

The Court erred in its conclusion of law that "the transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff was valid as against Steele and Cutler; at most it could only be complained of some one having an interest in the estate of which it was part of the assets."

The transfer appears from the evidence to have been for the sole use and benefit of Theodore Huston, (Record pp. 24

and 29), who was one of the executors of Rigdon Huston, deceased, the note was the property of the estate.

This transfer was void, being against public policy which forbids a trustee from becoming a purchaser of any of the trust property.

Kruse vs. Stephens, 47 Ill., 112.
Miles vs. Wheeler, 43 Ill., 123.
Paul vs. Squibb, 12 Pa. St., 296.

It would seem to be elementary that all persons whose rights are affected by a transfer of a chose in action have such an interest therein as to have the right to attack the transfer if made illegally, even though the parties to the transfer may themselves be concluded thereby.

In the present case the rights of the plaintiff in error are claimed to have been changed and in great part lost by the illegal transfer of an asset of an estate to one of the executors of that estate by color of an assignment thereof to his wife for his benefit.

To sustain such a doctrine would be in effect to decide that executors of an estate may, by a fraudulent disposition of the assets thereof, defeat the lien of an honest mortgagee in good faith, which, before such fraudulent disposition, he held as a valid and legal incumbrance against a debtor of the estate. In other words, by the illegal act of the executors the valid and legal lien of an honest mortgagee is converted into an illegal and fraudulent one! Such a proposition needs only to be stated to carry with it its own condemnation.

It will be borne in in mind that the defendant in error is seeking to place herself in such a position as to entitle her on technical, statutory grounds only, to vacate a chattel mortgage, honestly and lawfully made, without fraud, to secure an honest indebtedness, because of the neglect, without fraud, of the mortgagee to file the same. She is seeking to enforce a statutory forfeiture; to do this she ought to be held to show a complete title in herself untainted by fraud, and held in good faith. This she has not done.—Even under the conclusions of law of the Court below her title is fraudulent and

voidable as to all persons interested in the estate of Rigdon Huston in case any such person should take action; and in such event the transfer would be set aside and the title in the note would revert to the executors of the Rigdon Huston estate just as if it had never been made. This would result, according to the theory of the conclusions of law of the Court below, in the chattel mortgage again becoming good! The final result of the whole being that the executors themselves being postponed to the mortgage could by their own act in transferring the note to one of themselves as beneficial holder, avoid the mortgage, and some other person interested in the estate but not a party to the mortgage could by *his* own act restore the mortgage. Such a proposition would be absurd on its face.

The transaction on which the supposed title of defendant in error rests, is intentionally and knowingly in evasion of the law and no Court will lend its aid to one who founds his cause of action upon an immoral or illegal act.

Hinnen vs. Newman, 35 Kansas, 709; 12 Pac. Rep., 144.
Feineman vs. Sachs, 33 Kan., 621; 7 Pac. Rep., 222.
McIntosh vs. Renton, 2 Wash. T., 121; 3 Pac. Rep., 830.
Bech vs. Smith, 2 Wash. T., 145; 3 Pac. Rep., 831.
Fisher vs. Lord, 63 N. H., 514; 3 Atl. Rep., 927.

The seventh assignment of error that the Court erred in its conclusion of law that "In consequence of the failure to file the chattel mortgage given by Steele to Cutler and of the plaintiff beboming a creditor of Steele in the meantime, the said chattel mortgage was and is void as to her and of no effect"; and the eighth assignment that the Court erred in its conclusion of law that "It appearing that the garnishee had property of the principal defendant at the commencement of these proceedings in his possession in value greater than the amount of plaintiff's judgment and which he has appropriated to his own use, judgment should be rendered in favor of the plaintiff and against said garnishee for the amount of plain-

tiff's judgment against the principal defendant Steele and interest on the damages thereby recovered"; and the ninth assignment that the Court erred in "Directing a judgment to be entered for the plaintiff against the garnishee defendant," are all three dependent upon the fifth and sixth assignments, but, in addition to what has already been said, we insist that the defendant in error must be held to a strict construction of the statute, it being admitted that there was no actual fraud on the part of the plaintiff in error, and that, in any event, plaintiff in error is entitled to the benefit of that section of the statute of garnishment which provides that "Every garnishee shall be allowed to deduct from the property in his hands all his demand against the principal defendant of which he could have availed himself if he had not been garnished, whether by set off at the trial or upon execution, and shall be liable for the balance only after adjustment of mutual demands: *provided* that in the adjustment no claims for unliquidated damages for wrongs or injuries shall be considered." 2 Howell's Ann. Statutes, § 8097.

This is not a case where a chattel mortgage has been intentionally and fraudulently kept from the files to the end that the mortgagor might be enabled to keep up his credit and obtain goods from others who were deceived as to his standing, nor is it a case where any dealing whatever has been had with the principal defendant during the interim, wherein he has been given credit, extension or any other valuable thing or privilege on the faith of this property being unincumbered, and no equitable reason exists why the plaintiff in error should not be allowed as garnishee the benefit of his counterclaim.

The evidence shows without dispute that the amount of the claim of Mr. Cutler, plaintiff in error is $40,000 (Record, p. 31), and the amount for which the property sold was only $15,000 (Record, p. 34), and therefore his counterclaim would more than cover the value of the property.

Moreover from the published report of the case of Cutler vs. Steele, et al., 85 Mich., 627, the decision wherein was

rendered after the trial of the present case, it appears that the State Supreme Court compelled the plaintiff in error to pay out of the $15,000 nearly $11,000 on account of notes and extensions actually given by Steele in the interim; thus if the judgment of the Circuit Court in this case is to stand, making him pay over $11,000 more, plaintiff in error, Cutler, will be over $7,000 worse off than if had merely lost his debt due him from Steele. As this case was not decided at the time of the former trial it is not in the record and possibly technically this Court cannot consider it, but such is the evident result.

Suppose no chattel mortgage whatever had been given and Mr. Cutler had simply taken possession of the property, then at the time of the service of process on him August 7th, 1890 he would have had property in his possession belonging to Steele worth $15,000 subject to liens decreed thereon in ler vs. Steele, 85 Mich., 627 of $10,665.96 and Steele was then indebted to him personally in the sum of $8,000 for money loaned and $20,000 for endorsements on his paper which he had become liable to pay and had paid besides being indebted to the Bank of which Cutler was president in the sum of $12,000. There could be no doubt what the amount of the indebted ness from Cutler to Steele would in that case be deducted under § 8097 above cited and as the debt exceeded the value of the property, this would fully exonerate the plaintiff in error as such garnishee.

How can this result be changed by the fact that plaintiff in error had in good faith and without fraud, accepted a mortgage even if that mortgage should be legally void? Defendant in error had never obtained a lien on the property herself by attachment, levy of execution or otherwise, she could only take from the garnishee the amount he would at law be compelled to pay to the principal debtor Steele, which in this case would be nothing, because the property was less in value than the amount of Steele's indebtedness to the Garnishee.

We submit that the judgment of the Court below should

be reversed and as upon the admitted facts there cannot be any recovery, final judgment for plaintiff in error should be rendered in this Court.

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Attorneys for Plaintiff in Error, and of Counsel.

158-463

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CASE No. 14,743.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

TERM No. 229.

DWIGHT CUTLER, GARNISHEE, ETC., PLAINTIFF IN ERROR,

vs.

ANNA B. HUSTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

THOMAS F. McGARRY,
Attorney for Defendant in Error.

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STATEMENT OF THE CASE.

1. This is an action in the nature of a garnishee proceeding, brought under the statutes of Michigan, by Anna B. Huston, as plaintiff, against Dwight Cutler, garnishee defendant of William Steele, principal defendant. The provisions of the statutes relating to the present controversy, are as follows:

"That in all personal actions arising upon contract, express or implied, brought in the several courts or municipal courts of civil jurisdiction, whether commenced by declaration, writs of capias, summons or attachment, and in all cases where there remains any sum unpaid upon any judgment or decree rendered in any of the several courts hereinbefore mentioned, or upon any transcript of a judgment filed in said courts, if the plaintiff, his agent or attorney, shall file with the clerk of the said Circuit Court at the time of, or after the commencement of suit, or at any time after rendition of judgment or decree or the filing of a transcript of judgment, an affidavit stating that he has good reason to believe and does believe, that any person (naming him) has property, money, goods, chattels,

credits or effects in his hands or under his custody or control, belonging to the defendant or any or either of the defendants, or that such person is indebted to the defendants, or any or either of the defendants, whether such indebtedness is due or not, and that the principal defendant, or any or either of the defendants (naming him or them) is justly indebted to the plaintiff on such contract, judgment, decree or transcript, in a given amount, over and above all legal set offs, and that the plaintiff or affiant is justly apprehensive of the loss of the same, unless a writ of garnishment issue to the aforesaid person, a writ of garnishment shall be issued, sealed and tested in the same manner as writs of summons, and directed to the sheriff, reciting the commencement of said suit, or the rendition of judgment or decree against the principal defendant, or any or either of the defendants, or the filing of a transcript of judgment, and the filing of the affidavit aforesaid, and thereupon commanding said sheriff to warn and summon such person to appear before said court on a day named, not less than fourteen days from the date of issuing the same, to make disclosure in writing under his oath to be filed with the clerk of said court, touching his liability as garnishee of the principal defendant, or any or either of the defendants (naming him or them), as charged in said affidavit, and thenceforth pay no money and deliver no property to the principal defendant, or any or either of the defendants, and of said writ make due return."

(Sec. 8058, 3 Howell's Statutes of Michigan.)

"From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels and effects under his control, belonging to the principal defendant, or of any debts due or to become due from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, and for all property, personal and real, money, goods, evidences of debt, or effects of the principal defendant, which such garnishee defendant holds, by conveyance, transfer or title that is void as to creditors of the principal defendant, and for the value of all property, personal and real, money, goods, chattels, evidences of debt or effects of the principal defendant, which such garnishee defendant received or held by a conveyance, transfer, or title that was void as to creditors of the principal defendant; and such garnishee defendant shall also be liable on any contingent right or claim against him in favor of the principal defendant."

(Sec. 8059, 3 Howell's Statutes of Michigan.)

"The affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff in trover against the garnishee as defendant, where the garnishee is chargeable for property, and for money had and received, when he is chargeable upon indebtedness against the garnishee, and upon the filing of the garnishee disclosure, or upon filing of the answers to such written interro-

gatories in cases where the same are required and filed, or upon the filing of the report of the testimony or statement made by such garnishee on such personal examination in cases where the same are required and filed, or upon the filing of the report of the testimony or statement made by such garnishee on such personal examination in cases, where such examination is had, the matter of such affidavit shall be considered as denied (except so far as the same is admitted by such disclosure, answers to interrogatories or report, which admissions shall have the effect of admissions in a plea, and also shall be prima facie evidence of the matters therein admitted.) And thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff. (And judgment may be rendered against such garnishee defendant, as upon declaration and plea, or (on) plaintiff's motion to the Court at any time after the final judgment against the defendant in the principal cause, without further notice to such garnishee; PROVIDED, HOWEVER, if such plaintiff or such garnishee defendant shall within ten days after filing of such disclosure, answer, or statement, file with the clerk of such court a demand for trial of the cause, said cause shall stand for trial in the manner provided by this act.)"

(Sec. 8068, 2 Howell's Statutes of Michigan.)

"When the garnishee shall be adjudged liable as such, except when it is otherwise specially provided, judgment shall be rendered and execution issued against such garnishee, his own goods and estate, for the account (amount) of the judgment and costs against the principal defendant, if the garnishee's liability shall be for so much, otherwise for the amount thereof."

(Sec. 8090, 2 Howell's Statutes of Michigan.)

"If any person shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to creditors of the defendant, or if any person garnisheed shall have received and disposed of any of the property aforesaid of the principal defendant, which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property, and for the value thereof, although the principal defendant could not have maintained an action therefor against him."

(Sec. 8091, 3 Howell's Statutes of Michigan.)

2. December 14, 1889, the plaintiff below brought suit against the principal defendant, William Steele, upon the following promissory note:

"$9,600 BLANDINSVILLE, ILL., NOV. 22, 1886.

On or before one year after date we promise to pay to the order of executors of Rigdon Huston's estate, at the Second National Bank of Ionia, Mich., the sum of nine thousand six hundred dollars, at the rate of six per cent. per annum, eight per cent. per annum from maturity, value received.

(R., p. 2.) WM. STEELE."

And afterwards, on the 15th day of March, 1890, obtained judgment for the sum of $10,410.00, and costs taxed at $31.80. (R., p. 3.)

3. On the 5th day of August, 1890, the plaintiff below commenced suit against Dwight Cutler as garnishee defendant, upon the theory that said Dwight Cutler then had in his possession and under his control, property which he held by a conveyance, transfer or title that was void as to creditors of the principal defendant. (R., p. 5.)

4. Under stipulation of parties, the case was tried before the court without a jury. (R., p. 9.) The Court found the following to be the facts established by the testimony:

First. On the 22d day of November, 1888, the principal defendant, William Steele, executed and delivered to the executors of Rigdon Huston's estate, for a valuable and sufficient consideration, his promissory note for the sum of $9,600, payable in one year from that date, with interest at six per cent.

Second. The said Rigdon Huston died on or about the 7th day of May, 1887, leaving several legatees, of whom Theodore Huston, the husband of the plaintiff, was one. The said Theodore Huston was one of the executors of the will of Rigdon Huston also, there being two others, namely John Huston and Charlie R. Huston. The decedent and all the persons named in this paragraph, resided in the State of Michigan.

Third. The plaintiff's husband, contemplating going into business which required capital, was desirous of obtaining from the said estate some portion—the share coming to him as aforesaid, and, upon his application to the other executors of said will, it was agreed between all three that the said Steele note should be turned over to him upon his giving back his note signed also by the plaintiff, for the sum of five thousand dollars, payable to the executors of said will, in one or two years from its date.

Theodore Huston wished and intended to use this Steele note as collateral, for the purpose of raising money for the use of his business above mentioned. On account of the legal obstacle to transferring the note to himself, Theodore Huston, with the assent of the plaintiff, arranged to have this Steele note indorsed to her. The agreement in its several parts, as stated in this paragraph, was executed and consummated on the 17th day of August, 1889, by the endorsement to the said plaintiff of the said note of Steele by the three executors aforesaid, and the delivery to them of the note of Theodore Huston and the plaintiff for the sum of $5,000 aforesaid. This last amount being the excess of the Steele note over the advancement on Theodore Huston's share in said estate then intended to be made, the note of Theodore and his wife was given and received to represent and stand in lieu of the portion of said note not intended to be then advanced.

Fourth. There was no actual fraud on the part of any of the parties to the transactions mentioned in paragraph three.

Fifth. The plaintiff brought suit on said Steele note in this court on the 14th day of December, 1889, and recovered judgment against the maker on the 15th day of March, 1890, for the sum of $10,410, damages and costs taxed at $31.80.

Sixth. On the 12th day of July, 1889, the garnishee defendant, Dwight Cutler, was a creditor of William Steele in a considerable sum, and had also endorsed Steele's notes for a considerable amount, and it was contemplated that possibly Cutler might make other advances to Steele. Steele was possessed of a large and valuable property, but was deeply in debt. On the day last mentioned, he executed a number of conveyances and mortgages covering the substance of his property to various parties; among the rest a real estate mortgage for $25,000 to Mr. Cutler to secure the re-payment of that sum that day loaned by Cutler to Steele.

Seventh. On the aforesaid 12th day of July, 1889, the said Steele executed and delivered a chattel mortgage covering a large amount of personal property to the said Cutler, the condition of said mortgage being as follows: That "Steele shall pay or cause to be paid the said D. Cutler all notes held by him, together with all notes of said Steele, upon which said Cutler is endorser; also any notes of said Steele held by the First National Bank of Grand Haven, and any and all renewals thereof, together with any endorsements, loans or advances hereafter made by said Cutler to said Steele, or liabilities incurred in his behalf at the maturity of notes or the renewals thereof, then this instrument shall be void and of no effect."

The possession of the property mortgaged was not changed, but remained with the mortgagor. This chattel mortgage and the other securities and deeds mentioned in the preceding paragraph were withheld from filing or record for the time being by an understanding of the parties, but there was no actual fraud intended in such withholding. On the 29th day of August, 1889, this chattel mortgage was filed in the proper clerk's office, and the other deeds and mortgages were properly recorded or filed on that day or the following day.

Eighth. Mr. Cutler has duly foreclosed his chattel mortgage from Steele, and himself became the purchaser of the property therein mentioned. Such property was received into his possession by virtue of such chattel mortgage, some time in the spring of 1890, and was sold thereon to Cutler on or about the 6th day of September, 1890, and was then of a value greater than the amount of the plaintiff's judgment aforesaid against Steele for damages and costs.

Ninth. Neither the plaintiff nor Theodore Huston had any notice or knowledge of the chattel mortgage from Steele to Cutler aforesaid, prior to the filing thereof. (R., pp. 9, 10, 11 and 12.)

5. The Court thereupon announced the following conclusions of law:

First. Upon the facts as found, the plaintiff became a creditor of William Steele on the 17th day of August, 1889, within the intent of Section 6193 of Howell's Statutes of Michigan, and while the chattel mortgage from Steele to Cutler aforesaid, remained unfiled.

Second. The transfer of the Steele note of $9,600 from the estate of Rigdon Huston to the plaintiff, was valid as against Steele and Cutler. At most it could only be complained of by some one having an interest in the estate of which it was part of the assets.

Third. In consequence of the failure to file the chattel mortgage given by Steele to Cutler and of the plaintiff becoming a creditor of Steele in the interim, the said chattel mortgage was and is void as to her, and of no effect.

Fourth. It appearing that the garnishee had property of the principal defendant at the commencement of these proceedings in his possession of greater value than the amount of plaintiff's judgment, and which he has appropriated to his own use, judgment must be rendered in favor of the plaintiff and against said garnishee for the amount of plaintiff's judgment against the principal defendant, Steele, and interest on the damages thereby recovered, in all $11,421.96.

And judgment was accordingly rendered for this amount. (R., p. 12.)

6. Mr. Cutler, by his counsel, alleges exceptions to two of the findings of fact, and all the conclusions of law. (R., pp. 13 and 14.)

The findings of fact excepted to are:

(1.) In paragraph 3, wherein the trial court finds that the plaintiff "assented to have the Steele note indorsed to her;" and

(2.) In the 7th paragraph, wherein the trial court finds that the "chattel mortgage and the other securities and deeds were withheld from filing or record for the time being, by an understanding of the parties."

ARGUMENT.

No error is assigned that relates to the admission or rejection of testimony; nor is any error alleged for failure of the trial court to pass specifically upon any proposition of law submitted to him. The only question, therefore, open for discussion upon this record, is, *whether the facts found support the judgment.* For convenience in argument, this may be divided into

1. How far the conclusions of the trial court on the questions submitted to him, are subject to review;

2. Whether the facts found are not supported by the evidence; and

3. Whether under the facts and circumstances of this case, the plaintiff was a creditor of William Steele, the principal defendant, within the meaning of Section 6193 of Howell's Annotated Statutes of Michigan, which declares that an unfiled chattel mortgage, unaccompanied by delivery or change of possession, is absolutely void.

I.

How far the Conclusions of the Trial Court on the Questions Submitted to Him, are Subject to Review.

The Court below, in dealing with the case, was concerned with the evidence as well as the law. The Judge acted in the two-fold character of court and jury. But it is differect here. The attitude of this court to the contention is strictly that of a court of error. There is no power to consider anything except the points of law which were adjudged in the court below, and such aspects of fact as are necessary for their solution.

Mower's Appeal, 48 Mich., 441-7-8-9.
Marx vs. McGlyn, 88 N. Y., 357.
Burnap vs. Nat'l Bank of Potsdam, 96 N. Y., 125-131.

The testimony and matters of fact which are not pertinent in view of these cases, are superfluous. So far as the Judge acted in the character of a *jury*, his doings are immutable here. He was, in fact, a jury of *one*, instead of *twelve;* under the stipulations signed by the parties submitting the case to the Court without a jury, it follows as a necessary consequence that his final decision as a Judge, which is the regular outcome of his general conclusion in matter of fact, must be conclusive. The form of the evidence is immaterial, whether documentary, oral, express, inferential or presumptive, makes no difference whatever.

Yelverton vs. Steele, 40 Mich., 538-40.
Johnson vs. Crispell, 43 Mich., 361.
Mitchell vs. Chambers, 43 Mich., 150.
Parsons vs. Clark, 59 Mich., 414.
Norris vs. Jackson, 9 Wall., 125.
Coddington vs. Richardson, 10 Wall., 516.
Miller vs. Insurance Co., 12 Wall., 297.
Tyng vs. Grinnell, 92 U. S., 469.
The Abbottsford, 98 U. S., 440.
Clark vs. United States, 6 Wall., 254.
Warner vs. Norton, 20 How., 448.
Gregg vs. Sayre, 8 Pet., 244.

In the light of the foregoing authorities, we believe that upon this record no question can arise under the exceptions to the findings of fact; but on the contrary, that this Court will accept the findings of fact by the court below, as conclusive.

II.

Whether the Facts Found are not Supported by the Evidence.

The facts found are supported by the proof.

1. The plaintiff below, Anna B. Huston, joined with her husband in signing the note of $5,000 which was given to the estate of Rigdon Huston, deceased, in part payment for the Steele note. (R., pp. 22 and 29.) She was financially responsible. (R., pp. 22 and 30.) She is liable on her note. (R., p. 24.) And may be called upon to pay it. (R., p. 28.) The note was indorsed to her. The suit thereon was brought in her name, and the present proceedings were instituted in her name. There is no proof that she did not assent to the arrangement. The Court below was justified from these conceded facts, in reaching the conclusion that it was "with the assent of the plaintiff, arranged to have the Steele note indorsed to her." For no other purpose was her note given.

2. Was there not sufficient proof that "this chattel mortgage and the other securities and deeds mentioned, were withheld from filing or record for the time being, by an understanding of the parties?"

There was some sort of understanding. Mr. Cutler requested security. The deed to Mrs. Steele was delivered to Mr. Cutler, with the agreement that it should be recorded when his mortgages were. This fact proves that these conveyances were to be withheld for some time, until the happening of some contingency, when, if recorded at all, they were to be put on record *together*. There was no need of this unless there was an arrangement, for the deed is expressly given subject to the mortgage. Mr. Steele lived at Ionia, and Mr. Cutler at Grand Haven. The conveyances were all made at one time. They were all parts of one transaction. Mr. Steele also knew that the Cutler mortgage and his wife's deed had not been recorded, because on the day he delivered the Dunham mortgage, he telegraphed to Mr. Cutler to send the conveyances to him. Mr. Cutler kept them in his private drawer until Mr. Steele telegraphed him to send them. He then sent them to Mr. Steele, in accordance with Mr. Steele's request.

How does it happen that these conveyances were all made on the same day, kept in secret the same time, recorded the same hour, at five minute intervals, unless there was some such arrangement?

Mr. Cutler had the utmost confidence in Mr. Steele. He asked for and obtained securities. Why did he not record those securities if there was no agreement to withhold? How did Mr. Steele happen to know that Mr. Cutler still retained those papers, unless it was agreed that Cutler should keep them until notified by Steele? The proofs all show that there was a tacit understanding that the conveyances should be withheld. At whose expense was this experiment to be tried?

This brings us to the question

III.

WHETHER THE PLAINTIFF IS A CREDITOR OF THE PRINCIPAL DEFENDANT WITHIN THE MEANING OF THE STATUTE WHICH DECLARES UNFILED CHATTEL MORTGAGES, UNACCOMPANIED BY DELIVERY, OR CHANGE OF POSSESSION OF THE PROPERTY MORTGAGED, ABSOLUTELY VOID?

That the plaintiff was a creditor, and that she became such a creditor on the 17th day of August, 1889, while the chattel mortgage was being withheld from record, there can be no dispute. The facts are conceded. The law is, that a creditor is one who has a right to require the fulfilment of an obligation or contract.

Bouv. Law Dic., Title, Creditor.

4 Am. & Eng. Enc. of Law, 573.

While in general it is essential that there should be a privity of contract between the parties, in order to constitute the relation of debtor and creditor, still parties frequently become creditors unknown to the debtor—in cases where the former receives an assignment or transfer of commercial paper, the title to recover which may be conveyed either by endorsement or delivery. The latter is the case before the Court.

Cutler vs. Steele, 85 Mich., 627.

Brown vs. Brabb, 67 Mich., 17.

Crippen vs. Jacobson, 56 Mich., 386.

Dempsey vs. Pforzheimer, 86 Mich., 652.

That the plaintiff below is entitled to all the rights which her husband, Theodore Huston, would have been entitled to were he before the Court as plaintiff in these proceedings, is settled as the law of Michigan by the case of Crippen vs. Fletcher, 56 Mich., 386.

But, it is claimed that the plaintiff's husband was the real party in interest, and, being one of the executors of the estate, could not purchase the note in question, and is therefore not entitled to protection under the recording and filing acts of Michigan. To this we reply:

1. While it is true that, upon the appearance of certain relations between the parties, termed relations of confidence, the law raises the presumption of fraud; a presumption that the transaction was affected through fraud or undue influence of the opposite party, by reason of his occupying the position affording him peculiar opportunities for taking advantage of the complaining party; yet the effect of this rule, is simply one concerning the weight of proof. Instead of the burden of proof resting upon the complaining party, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his actions have been honest and honorable.

Bigelow on Fraud, 190, et seq.

Seeley vs. Price, 14 Mich., 546.

Wartemberg vs. Spiegel, 31 Mich., 403.
Hammontree vs. Lott, 40 Mich., 195.
Duncombe vs. Richards, 40 Mich., 166-167.
Storrs vs. Scougale, 48 Mich , 388.
Graham vs. La Crosse, etc., Railroad Co., 102 U. S., 148.
Field vs. Seabury, 19 How., 323.
Spencer vs. Lapsley, 20 How., 264.
Loose vs. Navarre, 95 Mich., 603.
Coles vs. Trecothick, 9 Vesey, 234-246.
Spencer & Newbold's Appeal, 88 Pa. St., 317.
Stalle vs. Chandler, 26 Mo., 124.
Jones vs. Smith, 33 Miss., 215.
Pugh vs. Bell, 1 J. J. Marsh., 399.
Graves vs. Waterman, 63 N. Y., 657.
Brooks vs. Martin, 2 Wall., 70-85.

2. The trial court found, as a matter of fact, that there was no actual fraud on the part of any of the parties to this transaction. (See 4th Finding, R., p. 10.)

3. This was not a sale from Theodore Huston to himself. The other executors all consented. The price paid was adequate; all the information possessed by the plaintiff's husband was conveyed to John Huston and Charlie Huston, plaintiff's husband's co-executors, who represented the estate in this transaction. There was no concealment or misrepresentation. The Probate Court of McDonough County approved the transaction. (R., p. 25.) Moreover, this transaction was carried out only upon the advice of the counsel for the estate, and with the approval and sanction of the Judge of Probate. (R., pp. 22 and 23.) The advise of counsel, the concurrence in the arrangement by Charlie R. Huston and John Huston, two of the executors who are in no way interested in the estate's parting with the note for less than its value, and the approval of this transaction by the Probate Court of McDonough County, presumably after full hearing on the account, relieves the case from all question of fraud.

Kerr on Fraud and Mistake, p. 387.

4. The will (R , pp. 36, 37 and 38,) which is an eminently fair and impartial distribution of the property, makes a present partition and distribution of all the real estate between the testator's children. The executors are clothed with authority to use their best judgment in closing out the personal property. The testator's brother, John Huston, is appointed custodian of the finances, and therefore had full authority to sell the notes belonging to the estate to anyone he chose, without consulting the other executors; and had his indorsement alone been on the note in question, it would have been a valid transfer. The 13th clause of the will shows that the testator owed Theodore, the plaintiff's husband, March 31, 1887, $4,865.59. There is more reason for claiming that this transaction was a mere payment, by the estate, of the amount due

Theodore, and an advancement of the residue, than a sale of the Steele note to him. He desired an advancement. Instead of money, this note was turned out.

Even if it be conceded that there was impropriety in the conduct of Theodore Huston in having the note in question assigned to his wife and paying its full value to the estate, yet it appears affirmatively that no fraud was actually intended, or practiced; that the arrangement was satisfactory to all the parties; that it worked no injury to the estate; in fact has prevented the estate from loss. Can the plaintiff in error, who took his chances in withholding his mortgage from record, and allowing the plaintiff below, in the interim, to become, for a valuable consideration, the owner of the note, now defend his own want of prudence, not on account of any actual or constructive fraud against himself, but because the plaintiff's husband has done something which inflicted, in his mind, a theoretical, but not an actual injury on an uncomplaining stranger? There is no ground for claiming that the action of the plaintiff's husband was illegal in the sense of violating any public right or duty, or that it was absolutely void. At most it was a transaction with the estate; and the estate alone might either have authorized, or ratified, or condoned it.

The defendant is not in a situation to raise the question of legal fraud. None but the party injured can complain. None but the party injured can raise the question. None of the authorities justify its being raised here.

Crane vs. Reeder, 25 Mich , 303-310.
Spoon vs. Gilbert, 44 Mich., 533 538.
Richardson vs. Welsh, 47 Mich., 309-311.
Lewis vs. Rice, 61 Mich., 97-104.
Kerr on Fraud and Mistake, p. 371.

5. While the matters presented by the garnishment proceedings under the statutes above quoted, are triable at law, they are not limited to strictly legal demands and remedies, but involve and include rights and relief of an equitable character such as reaching the proceeds of property which is held by the garnishee by a conveyance, transfer or title that is void as to creditors of the principal defendant.

Crippen vs. Jacobson, 56 Mich., 386-389.
Heinman vs. Schloss, 83 Mich., 153-157.
Teusch vs. Ottenburg, 54 Fed. Rep., 867.

Having shown that the plaintiff below was a creditor of the principal defendant; that the plaintiff's husband has done nothing which can legally defeat her rights; that even if he had, the estate not complaining, the garnishee defendant is not in a situation to raise the question; and that the statutes of Michigan under which this proceeding was instituted, are broad enough to enable the plaintiff below to fully enforce her rights, we arrive at the general question under consideration.

Section 6193 of Howell's Statutes of Michigan, provides that "every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk," etc.

The decisions of the Michigan State Court have settled the construction of this statute beyond controversy.

Haynes vs. Leppig, 40 Mich., 607.
Fearey vs. Cummings, 41 Mich., 383.
Cooper vs. Brock, 41 Mich., 488-492.
Putnam vs. Reynolds, 44 Mich., 114.
Cummings vs. Fearey, 44 Mich., 39.
Wallen vs. Rossman, 45 Mich., 333.
Waite vs. Mathews, 50 Mich., 392.
Crippen vs. Fletcher, 56 Mich., 386-389.
Root vs. Harl, 62 Mich., 420.
Johnson vs. Stillwagen, 67 Mich., 10.
Cutler vs. Steele, 85 Mich., 627.
Dempsey vs. Pforzheimer, 86 Mich., 652.

The object and effect of the statute are fully explained in the cases which we have cited. They show plainly that a construction which would leave this case outside its provisions, would be narrow and technical and defeat its purpose in a large class of cases. It will be well to see what the Michigan State Court had said concerning its object and effect.

In Haynes vs. Leppig, 40 Mich., 602-607, it is said that it "makes unrecorded securities on personal property not only presumably, but absolutely void against creditors, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession."

In Fearey vs. Cummings, 41 Mich., 376-383, the garnishee, who took possession of personal property upon an unfiled chattel mortgage, was adjudged liable upon the theory that he was in possession of property which he held by a title or conveyance which was void as against a creditor of the principal defendant, who became such creditor while the mortgage remained unfiled.

In passing upon the question, the Court uses the following language: "If it was not put on file prior to plaintiffs becoming creditors, it was invalid as against them; *the law being that those who become creditors whilst the mortgage is not filed, are protected*, and not merely those who obtain judgments or levy attachments before the filing."

In Cooper vs. Brock, 41 Mich., 488-492, one Weatherby gave Cooper a chattel mortgage, which was not filed. Under it Cooper

brought replevin against Brock, as sheriff, for a quantity of hoops attached by him as the property of Weatherby. The Court below directed a verdict for the sheriff upon the ground that the mortgage not having been filed, was absolutely void as against the attaching creditor.

The Court says: "Under this section the question of good faith and want of intent to defraud creditors and purchasers, cannot arise; the good faith and *bona fides* of the mortgagor and mortgagee, one or both, cannot be made a factor in the case. The statute declares the instrument shall be absolutely void, and nothing short of a change of possession, or filing, as the section requires, can save it."

In Putnam vs. Reynolds, 44 Mich., 113, Putnam failed to file his chattel mortgage. Reynolds became insolvent and made a general assignment for the benefit of his creditors to Fitzgerald who had no knowledge of the mortgage. The assignee took possession and proceeded to make a sale of the goods in execution of his trust under the assignment. Putnam then filed a bill in equity to foreclose the mortgage. The Court held the assignee was not a purchaser for value, and not a creditor; that the assignee could not attack the mortgage if its invalidity arose from fraud of the mortgagor, but held it invalid under the statute and subject to be attacked by the assignee because withheld from record.

The Court speaks as follows: "If the mortgage was purposely left off the record, it was an act of bad faith which might justify its being declared void in fact, irrespective of the statute. There is reason to believe that such was the fact here, and that it was done to give the mortgagor a credit to which he was not entitled."

In Cummings vs. Feary, 44 Mich., 39-45, it is said: "As against the garnishing creditor, the garnishee holding under fraud is a wrong-doer, and his possession is not a rightful possession. By any other construction, a mortgagee holding by fraud is in as good a condition as an honest mortgagee. The law does not vitiate his mortgage merely when there is no consideration The defect is that, although there may be a full consideration, yet it has been used to injure and deceive other creditors."

In Waite vs. Mathews, 50 Mich., 392-393, it is said: "It was distinctly intimated in Kohl vs. Linn, 34 Mich., 360, and Fearey vs. Cummings, 41 Mich., 376; that in order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, *some act must be done, or some detriment sustained, during the interval;* as against all such rights, a mortgage, without such possession or filing, is absolutely and not presumptively void."

In Crippen vs. Fletcher, 56 Mich., 386 390, Crippen sued Jacobson and obtained judgment on four demands—one belonging to himself, and three derived by assignment. All claims were for money lent on the 12th, 13th and 14th days of May, 1884. The demands

not absolutely owned by Crippen were assigned to him, but he held them for the benefit of the assignors. In this way he obtained amount sufficient to give the Circuit Court jurisdiction. Fletcher was in possession of the stock of goods, under a mortgage dated May 9th, 1884, given to secure three previously existing notes, which mortgage was purposely kept from record until May 15th, when Fletcher filed it and took possession of the property. Fletcher was garnished and was adjudged liable to the extent of the goods and their proceeds.

The Court uses the following language: "When a chattel mortgage exists and is concealed, it is, under the statute, void, for the reason that it produces a false appearance of entire solvency, when in fact a person known to have mortgaged his stock, would not be as likely to get credit as one who had given no such security; and those who deal with such debtor are liable to be defrauded by appearances. One who gives credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void, at all events, against creditors who deal with a debtor so situated. Such creditors are directly within the policy of the statute."

In Root vs. Harl, 62 Mich., 420, on April 13, 1883, the firm of Harl & Stevens executed a chattel mortgage to secure a creditor, but did not file the same until July 16th. On August 6th, the firm executed an indemnity mortgage to another creditor. August 7th, the firm made a general assignment for the benefit of their creditors. Neither mortgage was actually fraudulent, but during the interim between the execution and the filing of the first mortgage, other creditors gave credits by way of sales, loans, and extension of the time of payment to the mortgagors, without knowledge of the existence of the mortgage. It was there held that the second mortgage had preference over the general creditors, but was subject to the first mortgage; but that those creditors who have credits, sold goods and extended payments while the mortgage was withheld from record, were prior to both mortgages.

The Court says: "Any creditors have a right to avoid an unrecorded mortgage who have, during its absence from the record, done anything material which they may be fairly considered to have done on the basis of its non-existence."

In Johnson vs. Stillwagen, 67 Mich., 10-13, it is said: "As the debt was honest, all that the statute provided as to those old mortgages was that they should be void until filed, and void against intervening rights. * * * * * Declaring them void merely places parties in the same condition as if they had never existed."

In Cutler vs. Steele, 85 Mich., 627, the Supreme Court of Michigan held the Cutler mortgage invalid on substantially the facts found in this case, and allowed Webber Bros. and the National City Bank of Grand Rapids priority. Webber Bros. renewed a note the day after the mortgage was given and before it was filed, and

the National City Bank of Grand Rapids accepted Mr. Steele as an indorser upon commercial paper.

In passing upon the case, the Court says: "We are therefore of opinion that the term "creditors" used in the statute, includes those who have entered into contracts with parties as indorsers, guarantors, or sureties. Such contracts in the commercial world are every day transactions. It is impossible to believe the Legislature did not enact this statute with a view to protect creditors against all those upon whose promises, whether principal or contingent, they had parted with valuable consideration."

In Dempsey vs. Pforzheim, 86 Mich., 652-655, a firm of jewelers borrowed $2,000 of Caspar H. Borgess and executed a chattel mortgage to secure such indebtedness. This mortgage was not filed until more than a year thereafter. After the mortgage was filed, the said firm executed another chattel mortgage to the defendant to secure an indebtedness incurred in the purchase of merchandise between the date of the execution and the filing of the Borgess mortgage. The Court held the second mortgage entitled to priority as against the first.

In passing upon the question, the Court says: "It is plain, under the rulings of this Court, that the Borgess mortgage was void for want of filing, as against the original indebtedness of Harris & Karpp to defendants, incurred while the mortgage was in existence and not filed, and for goods sold by defendants in the usual course of business, in ignorance of the existence of such mortgage."

It will thus be seen that the construction given to the statute in question by the highest court of the State of Michigan, has been uniform and settled, and is therefore binding upon this court as a rule of decision.

Polk vs. Wendell, 9 Cranch., 87.

Massey vs. Allen, 7 Wall., 351.

The Federal Court follows the decisions of the State Courts as to the recording acts of the State, if there is a uniform course of decision.

Townsend vs. Todd, 91 U. S., 452.

The decisions of the Supreme Court of a State under a State statute touching chattel mortgages made in such State, establish a rule of property as binding upon a court of the United States as upon the courts of the State.

Morse vs. Riblet, 22 Fed. Rep., 501.

Etheridge vs. Sperry, 11 Sup. Ct. Rep., 565.

(March 23d, 1891.)

We believe that the statute under discussion is broad enough to include the case of the plaintiff below; that the decisions of the Supreme Court of Michigan have conclusively covered the question in the cases cited, and are binding on this court. Were the question we are discussing asked the Supreme Court of the State of Michi-

gan, would not the language of Mr. Justice Campbell, in Harl vs. Root, be a sufficient answer?

"*Any creditors have a right to avoid an unrecorded mortgage, who have, during its absence from the records, done anything material which they may be fairly considered to have done on the basis of its non-existence.*"

Does not the decision of the Supreme Court of Michigan, in the case of Cutler vs. Steele, above quoted, substantially dispose of this question?

Does not this case come squarely within this rule? That the plaintiff below is a creditor of Mr. Steele is beyond controversy. His promise by the endorsement runs directly to her. Now, has anything been done during the absence of this chattel mortgage from record, which might fairly be considered to have been done on the basis of its non-existence? This is a question of fact which the trial court answers in the affirmative.

The statute in terms, it will be observed, includes among those entitled to its protection; (1) the creditors of the mortgagor; (2) subsequent purchasers, (3) subsequent mortgagees.

The courts construe the class of creditors intended to be protected by this statute against such mortgages, to be: "Any creditors who have, during the absence of such mortgage from the records, done anything material which they may be fairly considered to have done on the basis of its non-existence."

The reason for the protection to the plaintiff below in the present case applies as strongly to any case that can be suggested. It will be seen at a glance that the reason of the passage of the statute under consideration and of the law which has governed the decisions of the State Court in the construction of said statute, arise from what is an ordinary and common sense view of the natural relation of things. Ninety per cent of the business is done upon commercial paper. The purpose of the law, in its relation to business transactions, is to enlarge as much as possible the comity of credit, and to accord to commercial dealings a protection which will render them as facile and unincumbered as the nature of such dealings demands, in order that business men in their transactions with one another, may rely, in the acceptance of obligations, upon the substantial and visible possessions of those who assume them. In carrying out this purpose, it wisely allows all persons who become creditors, to rest securely upon the assurance that the debtor is the owner of that property which the public records indicate, and which he himself assumes to own, and in denying as against all those who merely withhold conveyances from the public records, and give to the debtor an appearance of entire solvency which he does not possess, the enforcement of such secret liens. And this is done for the reason that the withholding of such conveyances from the public records produces a false appearance of entire solvency which the public have a right to rely upon, and because those who do rely

upon such appearances would be defrauded thereby, if those who held such secret liens were allowed to enforce them. Hence, we find that those who, while the mortgage is withheld from record, trust the debtor for goods sold or money loaned, or renew notes, or sign bonds, or become security, are held to be within the protection of the statute. The protection is accorded to them without reference to whether the property purchased came under the terms of the chattel mortgage or not, or whether the money loaned went to the mortgagees or not. It does not rest upon the ground that the mortgagees derived any benefit by the withholding of the conveyance, but upon the distinct ground that by the withholding of such conveyance, the other parties have been defrauded; and that such withholding was an assistance in the consummation thereof.

But apart from the Michigan statute and the decisions of that state thereunder the doctrine of Estoppel, as against the holders of such secret liens, applies.

In the case of Rickard vs. Sears, 6 Adolphus & Ellis, 469, it was stated that: "The rule of law is clear that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time."

As stated in the subsequent case of Greggs vs. Wells, 10 Adolphus & Ellis, 90: "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he himself assisted in deceiving."

In Morgan vs. Railroad Company, 96 U. S., 716, in discussing the effect of an estoppel *in pias*, it is said: "The principle is an important one in the administration of law. It not infrequently gives triumph to right and justice when nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought, in good faith, to have spoken, shall not be heard to speak when he ought to be silent. He is not permitted to deny a state of things which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly on that belief. This principle of estoppel is applied to defeat the mortgage liens in cases where it appears that there was error on the part of creditors, and neglect upon the part of the lien-holders."

In Simon vs. Oppenheim, 20 Fed. Rep., 553, where mortgages were withheld, as in this case, from record, it is said: "That the mortgagee is estopped from asserting that he has, under his mortgage, a valid lien superior and prior to the rights of the creditors, * * * * * having chosen to keep the knowledge of the existence of his mortgage from the public when he should, in good

conscience, have given publicity thereto, and having thereby misled the creditors into making large sales on good credit to the mortgagor, he should not now, when it is to his advantage and to their injury, be allowed to assert that he holds a valid prior lien upon the stock of the common debtor."

In Rumsey vs. Town, 20 Fed. Rep., 558, the same rule is recognized; while in Lyon vs. Council Bluffs Savings Bank, 29 Fed. Rep., 565, those decisions are re-affirmed, and the validity of the mortgage, as against creditors who had been thus misled, denied.

We believe that Mr. Cutler is estopped from asserting that he has, under his mortgage, a valid lien superior and prior to the rights of the plaintiff below, having chosen to keep the real estate mortgage and the chattel mortgage, aggregating a security of $65,000, together with the deed from the common debtor to the debtor's wife, covering a farm worth $45,000 more, securely locked up in his drawer until the common debtor wired him to send the papers to him; and having chosen to keep the knowledge of the existence of these conveyances, including this chattel mortgage from the public, when he should, in good conscience, irrespective of the statute, have given publicity thereto; and having thereby misled the plaintiff and her husband into discharging $5,025.60 of an indebtedness due from the estate to him, and becoming obligated to pay $5,000 more, he should not now, when it is to his advantage and to their injury, be allowed to assert that he holds a valid prior lien upon this property.

We believe, therefore, that under the statute, as well as upon the principle of estoppel, which we have just discussed, the plaintiff's right is paramount to the right of the garnishee defendant; and if the case is really one of doubt, then the doubt should be resolved in her favor; for, as has been well said by the Supreme Court of the State of Michigan; in Anderson vs. Brenniman, 44 Mich., 198-202:

"Under such circumstances, where doubts exist, they must be solved in favor of the purchaser or creditor, and against the mortgagee, because he, having power to protect himself fully, and to prevent others from being deceived, has not done so."

We place the right of the plaintiff below to recover, upon three independent propositions:

1. Because the case comes clearly within Section 6193 Howell's Statutes of Michigan, and the decisions thereunder.

2. Because the garnishee defendant is estopped as against the plaintiff below, from claiming that his mortgage is valid and superior and prior to her rights.

3. Because this is a case which calls for the application of the familiar rule, that where one of two innocent persons must suffer, he who is most at fault must bear the loss.

We respectfully ask that the judgment of the court below be affirmed.

THOMAS F. McGARRY,
Attorney for Defendant in Error.

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1894.

TERM No. 229.

DWIGHT CUTLER,
Plaintiff in Error.

vs.

ANNA B. HUSTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Plaintiff's Supplemental Brief.

JOHN C. FITZGERALD,
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Attorneys for Plaintiff in Error, and of Counsel.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM 1894.

TERM No. 549.

DWIGHT CUTLER,
Plaintiff in Error.

vs.

ANNA B. HUSTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Michigan.

SUPPLEMENTAL ARGUMENT.

STATEMENT.

This is a suit in garnishment under the statutes of Michigan. There is but little dispute of fact. In July 1889, William Steele of Ionia, Michigan, who was reputed to be worth $250,000, was indebted to Dwight Cutler of Grand Haven, Mich., in the sums of about $28,000 and to the National Bank of Grand Haven of which Mr. Cutler was President about $12,000. He desired to obtain a further loan of $25,000, and this sum was obtained of one Mrs. Savidge upon Mr. Cutler's endorsement, and Steele gave to Cutler a chattel mortgage to secure him on the first indebtedness of $40,000 and a real estate mortgage to secure the $25,000. These mortgages without any fraud were not filed or recorded till the 29th day of August, 1889, 46 days after their delivery. Mr. Steele unknown to Mr. Cutler was much embar-

rassed when these mortgages were made, and failed in the following September.

The Michigan statutes provide that an unfiled chattel mortgage shall be void as to creditors who become such while the mortgage was off the file. Notes of Steele to the amount of $12,000 were renewed between the 13th day of July and the 29th day of August while the mortgage was unfiled, and Mr. Cutler was obliged to pay them.

(85 Mich. 627.)

He foreclosed his chattel mortgage and about September 6th, 1890, bought the property for $15,000. This suit in garnishment was then brought. The garnishment is based upon the following claim. In November 1888, Steele purchased of John, Theodore and Charles Huston, executors of the estate of Rigdon Huston of Blandinsville, Ill., certain cattle, the property of the estate, and took the note of Steele to themselves, due one year thereafter for $9,600. This note was deposited among the assets of the estate. In August 1889, Theodore wished to go into business for himself and wanted this Steele note. He agreed with his fellow executors to give the note of himself and wife for $5,000, and to receipt for a sufficient amount as received by him from the estate to make up the amount due upon the note. The note was endorsed on the back to the wife of Theodore, the garnishee plaintiff, but this was done to avoid any illegality in Theodore endorsing the note to himself. The note belonged to Theodore and his wife had no interest in it. The note was delivered to Theodore, and there is no proof that his wife ever knew of the endorsement to her, and no proof of any delivery to her. The endorsement was not made on the note to her for the purpose of securing her as surety, or to give her any interest in the note. It was simply to evade the law prohibiting Theodore from purchasing the property of the estate. All this is admitted, by the proofs. (Record pages 21, 22, 23, 24, 25, 26, 27, 28.) Theodore brought the note to Michigan, and caused suit to be brought upon it in the name of his wife, in the United States Court. Judgment was obtained and this suit in garnishment brought in September, 1890. The cause was tried before the Court without a jury and judgment entered against the

garnishee defendant for the full amount of the note and interest.

It is submitted that under the foregoing statement of facts the garnishee defendant was not liable.

It will be seen that the entry of the judgment in favor of the plaintiff was no proof of the liability of Cutler. To render him liable it was necessary to show that the plaintiff became a creditor of Steele during the time the chattel mortgage remained unfiled.

The statues of garnishment of the State of Michigan, are construed by the Supreme Court of that state as, in derogation of the common law and the subjects of strict construction.

Hanselman vs. Kegel, 60 Mich. 540;

Iron Cliffs Co. vs. Lahuis, 52 Mich. 394.

The remedy is a harsh one and is supported by no such equitable considerations as appeal to the court to give it effect in doubtful cases.

Farwell vs. Chambers, 62 Mich. 316.

They are not entitled to special favor, and no presumption can be raised in favor of plaintiff's claim.

Folkerts vs. Standish, 55 Mich. 463.

The Supreme Court of Michigan also construes the word creditor in this statute to mean only those persons INJURED, by the failure to file the mortgage. It must be some person who has had dealings with the mortgagor during the time the mortgage was unfiled. It means a creditor presumptively injured by giving or extending credit in reliance upon the property mortgaged.

Brown vs. Brabb, 67 Mich. 17.

THE PLAINTIFF IN GARNISHMENT WAS NOT SUCH A CREDITOR.

It has not been decided by the Michigan courts that a purchaser of a mortgagor's note from a payee not a creditor within the terms of this statute, becomes such creditor if the transfer is made while the mortgage is unfiled. The statute seems to contemplate an actual dealing with the mortgagor. But a decision upon this point is not important. The statute certainly contemplates an

actual, bona fide transaction. If the garnishee plaintiff claims a forfeiture under this statute because of the purchase of the mortgagor's note while a mortgage on his personal property was not filed, then it should appear that the transaction was her own; that the note was purchased as her own; that she became a creditor of the mortgagor, and therefore would be injured by the failure to file the mortgage.

A REAL and not a FICTITIOUS creditor can claim the benefit of the statute.

This is the established law in Michigan, and this statute is so construed. In Kohl vs. Lynn, 34 Mich. 360, the Court says, "The only object of the law is to protect those who have acquired rights under circumstances which would render them liable to be defrauded unless protected against instruments of which they knew nothing when they obtained their rights. It has always been held that a purchaser who had paid nothing could not thus be defrauded, and that no one could be protected as a bona fide purchaser except to the extent of his payments." "This doctrine has been too uniformly recognized to require discussion or citation of authorities."

The only ground then of recovery by the plaintiff in garnishment is that she was DEFRAUDED by the failure to file the mortgage. To the extent that she became a creditor in fact during that time the law would presume damage. But only to that extent, and this is a fact to be established on the trial. In what way did the plaintiff in garnishment suffer damage? What will she lose if she fails to recover in this suit? Plainly nothing. The only liability she ever assumed was upon the $5,000 note, and she could not possibly be defrauded beyond that sum. That amount she has not paid, her husband Theodore says he intends to pay it, and it appears in proof that he is abundantly good. The result then of a judgment against the garnishee would be the placing of some $14,000 in the hands of Anna B. Huston for which she never paid one cent and upon a claim that it is admitted was never hers or intended to be hers. Could absurdity in litigation go further than this? It is admitted that there was no fraud in the mortgage from Steele to Cutler. That this security was

given for an actual bona fide indebtedness, and given upon a further loan or indorsement by the mortgagee for $25,000. And it appears that this indebtedness was unsatisfied by a sale of the mortgaged property to the amount of more than $25,000. As a matter of facts Mr. Cutler was also obliged to pay $12,000 to satisfy extensions of credit on Steele's paper. It is freely admitted that Mr. Cutler must suffer all the legal and legitimate consequences of the failure to file the mortgage.

But the LEGAL and LEGITIMATE CONSEQUENCES are only to RE-IMBURSE a creditor for the ACTUAL LOSS suffered by this failure.

A judgment for the garnishee plaintiff in this case would add to her estate $14,000. What has she given for it? It is not claimed that she ever gave a penny. It is not pretended that any actual consideration ever passed from her. She don't claim any interest in this note. Certainly there can be no forms of law which sanction such gross and enormous injustice.

Suppose some person had loaned Mr. Steele $10,000, while this mortgage was off the file. Suppose this creditor had garnished Mr. Cutler after this suit was commenced. Would her claim have been considered for a moment as opposed to one where money had been actually loaned and a creditor has been acually defrauded? But if she would have no rights as against such creditor, she would equally have none as against Mr. Cutler, who was an honest creditor of Steele; who had a valid security untainted with fraud, and whose negligence in the filing of his mortgage only made him liable to those who in fact suffered from this negligence.

That the plaintiff in garnishment was not damaged may be shown by the testimony offered on her part: She did not testify. Her husband, Theodore, offered the only testimony as to the connection of his wife in the matter. In November, 1889, he came to see Mr. Steele with this note and claimed to own it. His testimony on this point is as follows:

Q. Did you tell him you owned this note?

A. I think I did.

Q. You did consider that you owned it, didn't you?

158

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CASE No. 14,743.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

TERM No. 229.

DWIGHT CUTLER, PLAINTIFF IN ERROR,

vs.

ANNA B. HUSTON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Reply to Brief in Behalf of Plaintiff in Error.

THOMAS F. McGARRY,
Attorney for Defendant in Error.

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It appears by the record that the principal defendant entered his appearance and pleaded the general issue (R., p. 2,) and the case proceeded to trial and judgment upon the merits without objection. This, under the Michigan decisions, was a waiver of the jurisdictional point insisted upon.

Railroad Company vs. Gray, 33 Mich., 461.

Gott vs. Bingham, 41 Mich., 227.

While the decisions of the Federal Court do not go to this extent, they nevertheless hold, without qualification or exception, that if the jurisdictional fact be not alleged in the proceedings, the judgment is erroneous, and may, upon writ of error, be reversed for that reason; but while the judgment remains unreversed, it is not a nullity, and cannot be collaterally attacked.

In the case of McCormick vs. Sullivant, 10 Wheat., 192, the question raised was, whether a decree could operate as a bar when the proceedings did not show that the parties to such decree, plaintiffs and defendants, were citizens of different states. Washington Judge, in delivering the opinion of the Court, and in answering the

reasons assigned why such decree should be declared a nullity, says: "But this reason proceeds upon the incorrect view of the character and jurisdiction of an inferior court of the United States. They are all of limited jurisdiction, but they are not, on that account, inferior courts in the technical sense of those courts whose judgments taken alone are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon writ of error or appeal be reversed for that cause. They are not nullities. * * * * * * * * * * * We are therefore of the opinion that the decree of dismission relied upon in this case, whilst it remains unreversed, is a valid bar to the present suit as to the above defendants."

This case has been approvingly quoted upon the point that a judgment is valid until reversed, although the jurisdiction be not alleged, in the following cases:

Bank of United States vs. Moss, 6 How., 40.
Kennedy vs. Bank of Georgia, 3 How., 611.
Farmers' etc. Co. vs. McKinney, 6 McLean, 10.
Holmes vs. Oregon, Cal. R. R. Co., 9 Fed. Rep., 237.
Brown vs. Noyes, 2 Wood & M., 80

So far, therefore, as the judgment against the principal defendant is concerned, the infirmity complained of, if any existed, could only be raised by a writ of error in that case, and cannot be raised collaterally in these proceedings.

The affidavit for the writ of garnishment in the present case (R., p. 5) which, under the statutes of Michigan, (Sec. 8063 2 Howell's Statutes, quoted on pages 4 and 5 of original brief) is held and considered as a declaration by the plaintiff in trover against the garnishee defendants, contains the following clauses: "That the above named plaintiff is a citizen of the State of Illinois; that heretofore, to-wit, on the 15th day of March, A. D. 1890, in this court and cause, the said plaintiff, Anna B. Huston, obtained and recovered judgment against the defendant, William Steele, who at that time was a citizen of the State of Michigan," etc. "And that deponent is apprehensive of the loss of the sum so recovered unless a writ of garnishment issue to Dwight Cutler, who is a citizen of the State of Michigan, and resides in the Sixth Circuit and Western District of Michigan, and in the Southern Division thereof." (R., p. 5.)

There can be no question but that these averments of the residence both of the plaintiff, principal defendant and garnishee defendant, are sufficient. This averment of citizenship could only be traversed by a plea in abatement to the jurisdiction. If not so controverted, it is deemed conclusively established.

Smith vs. Kernochen, 7 How., 216.
Jones vs. League, 13 How., 81.
De Sorby vs. Nicholson, 3 Wall., 423.
Evans vs. Gee, 11 Pet., 83.
Wickliffe vs. Owings, 7 How., 48.

P. W. & B. R. R. Co. vs. Quigley, 21 How., 214.

There being no plea to the jurisdiction putting in issue the allegation of the jurisdictional fact of citizenship; hence, so far as this case is concerned, it is conclusively admitted in the record. Even if the jurisdictional fact of citizenship were not alleged, still if in the whole record such jurisdictional fact appeared, the case would not be reversed.

R. R. Co vs. Ramsey, 22 Wall., 322.
Brooks vs. Sperry. 97 U. S., 390.
Robertson vs. Cease, 97 U. S., 646.

The cases cited in the brief of counsel for plaintiff in error in no way conflicts with these views.

In Robertson vs. Cease, Mr. Justice Harlan says: "It is the settled doctrine of this court, that in cases where the jurisdiction of the Federal Courts depends upon the citizenship of the parties, the facts essential to support that jurisdiction *must appear somewhere in the record.* Says the present Chief Justice, in R. R. Co. vs. Ramsey, 22 Wall., 322, 'they need not necessarily, however, be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record.' That view was approved in the subsequent case of Brooks vs. Sperry, 97 U. S., 390. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, *or they should appear affirmatively and with equal distinctness in other parts of the record.*"

In Race vs. Am. Central Ins. Co., 109 U. S., 278, the doctrine of the Robinson case is reaffirmed, and the decision approvingly quoted which held that it was sufficient if the fact of citizenship appeared from other parts of the record than the pleadings.

The fact of citizenship is made to distinctly appear from the record in this case, in the affidavit for the Writ of Garnishment, namely: the declaration in trover in these proceedings; hence the argument of the plaintiff in error on this branch of the case is not sound.

Our original brief anticipates and covers all other points raised and urged by the plaintiff in error.

THOMAS F. McGARRY,
Attorney for Defendant in Error.

Transcripts
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Records
1894

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Supreme Court U. States

158 U. S.

366 — 423

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